

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

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UNITED STATES OF AMERICA, :

Plaintiff, : Criminal Action No.

v. : 1:16-cr-10094-LTS

ROSS MCLELLAN, :

Defendant. :

----- x

BEFORE THE HONORABLE LEO T. SOROKIN, DISTRICT JUDGE

JURY TRIAL
Day 10

Monday, June 18, 2018
8:25 a.m.

John J. Moakley United States Courthouse
Courtroom No. 13
One Courthouse Way
Boston, Massachusetts

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Official Court Reporter
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P R O C E E D I N G S

(In open court.)

THE DEPUTY CLERK: The United States District Court for the District of Massachusetts is now in session, the Honorable Leo T. Sorokin presiding.

Today is June 18th, the case of United States vs. McLellan, criminal action 16-10094 will now appear before this court.

THE COURT: Good morning. I apologize for being late. I actually have been here for a long time and I got detained on another matter, so I apologize for that. I hate to make you come in so early and then make you wait.

So do we have anything to -- I see -- just for the record, all counsel and McLellan.

Are there any issues to resolve?

MR. FRANK: I think we just needed a little bit of clarification, which Mr. Johnston can address, on the issue for Mr. Shaw's testimony, on Your Honor's ruling from last night.

THE COURT: Who's -- just so I know.

MR. FRANK: He's the witness who will be testifying about --

THE COURT: Is this State Street?

MR. FRANK: Correct.

THE COURT: Okay. Sure.

1 MR. FRANK: And then we have an issue with
2 respect -- two other issues that are not for today, but that
3 we wanted to raise.

4 THE COURT: Okay.

5 Go ahead, Mr. Johnston.

6 MR. JOHNSTON: So my understanding, from the
7 Court's order, is that we aren't allowed to discuss any type
8 of civil liability that State Street may face as a result of
9 the AXA overcharges? Does that include if State Street would
10 have to -- could be sued by AXA for having overcharged them
11 and --

12 THE COURT: So here's what I was thinking, maybe
13 just to clarify a little more and -- was this: I was --
14 there may be more categories than this, but here's what I was
15 envisioning. It might be the categories of money. I imagine
16 State Street has or will spend money on lawyers to
17 investigate accountants or other types of people to do
18 investigations, responses. That they might be paying AXA
19 money for the same purposes. They might be reimbursing AXA
20 for its own legal fees, even if AXA paid some money on its
21 own.

22 They might be refunding or rebating, or however you
23 want to characterize it, they might be giving back the eight
24 or 900,000, whatever it was. They might also face potential
25 legal liability for a lawsuit from AXA or from the SEC, or

1 from the US Attorney's Office, or the Department of Justice.
2 So it -- what I was thinking is that you could ask -- you
3 could elicit from them what they have spent, in any of those
4 categories, and what they anticipate spending, but the
5 labeling -- the concern I have is the labeling.

6 So in other words, suppose they had spent a million
7 dollars on lawyers and accountants in whatever category. You
8 could elicit that and you could elicit that it was from
9 lawyers. And suppose they're -- this is my -- I have no idea
10 of this, I'm just imagining. That suppose they're
11 negotiating with the SEC or with the criminal prosecutors or
12 with -- for a settlement and they're somewhere between zero
13 and 20 million in the negotiations. Right? They could -- I
14 think it's permissible to say that they have further expenses
15 to incur and they anticipate those expenses could reach as
16 much as 20 million, but without specifying what it is, that's
17 what I was thinking; that they don't get to say that it's --
18 these are related to it, without further elaboration.

19 Because the concern that I have is the same
20 Government liability implies sort of a determination of
21 guilt.

22 MR. JOHNSTON: So if the term "government
23 liability" wasn't used, but let's say the question is --

24 THE COURT: What do you want to elicit?

25 MR. JOHNSTON: So something like asking, are there

1 any -- is there any outstanding liability with respect to
2 AXA, or any ongoing negotiation with respect to AXA.

3 THE COURT: So to me, the real relevant thing is
4 what have they paid and what might they pay. And not what is
5 it for, other than, obviously, the -- implicit in any
6 question is that it relates to the AXA thing, as opposed to
7 paying money to build a new building. So why does it matter
8 what kind of payment it is?

9 MR. JOHNSTON: It doesn't really matter, Your
10 Honor, just for the jury to be able to understand why this
11 money is being paid. It just -- because out of the kindness
12 of their hearts, or is it because they feel like they're
13 obligated to do it, which is what goes to more than -- this
14 isn't a discretionary payment, but it's a loss that they
15 are --

16 MR. FRANK: It's a liability.

17 MR. JOHNSTON: Because it's a liability that when
18 they -- when an employee of theirs overcharges a client, that
19 gives the client certain recourse.

20 THE COURT: Sure.

21 MR. JOHNSTON: That then can cost them money. So
22 it's not just, yeah, we feel bad, here you go. It's here's a
23 payment, because we're going to need -- we don't want to drag
24 this out in an expensive lawsuit, where we could have jury
25 damages.

1 THE COURT: Well, how much are you going to -- if
2 he asks the question, how much has the AXA matter cost you
3 money? Yes. How much? \$2 million. What, if any, further
4 expenses -- how much of any further amounts do you reasonably
5 anticipate that you might incur? 1 to 5 million.

6 How much are you going to challenge the amount or
7 the connection?

8 MR. WEINBERG: What I respectfully challenge is the
9 subject matter, Your Honor. First of all, to go back a step,
10 we have made motions to sever this count. We see almost no
11 overlap now that the evidence about AXA is virtually
12 complete. I consider this to be extremely prejudicial. I
13 see it to be extremely unnecessary. I see the ineluctable
14 message to the jury that State Street bank, in quotes,
15 believes, (a), there was an overcharge, (b), we're going to
16 compensate it, (c), it's worth millions, all of which is
17 essentially telling this jury, from some man named Shaw, who
18 had no firsthand involvement, that was not a participant in
19 2011, that the global bank, in quotes, aligns itself with the
20 Government's view that this was a fraud that's worth millions
21 of dollars.

22 The element that this is directly related to is
23 such a narrow element. It says, "Does the bank have
24 potential risk?" We're not going to contest the bank has
25 potential risk, when there's an employee issues that result

1 in disagreements between clients and banks. Potential risk.
2 It doesn't have to be quantified, it doesn't have to be
3 monetized, it doesn't have to be particularized. All they've
4 got to do is ask this man, you've been around, you're a
5 controller, when there are issues and when clients complain
6 about charges, what is the bank's potential risk? Our
7 potential risk is we have to -- we pay money back to maintain
8 good relationships. We pay money to investigate. We pay
9 money to do accountants. That's the end of the element.

10 I can represent to this Court that I do intend, in
11 final argument, to dispute that the bank has potential risks.
12 But I believe Your Honor has given them a license to backdoor
13 this AXA case, which is otherwise a very, very weak
14 allegation, to backdoor it through Shaw's testimony, into
15 something far more than it is. And I understand they're
16 paying money, it's not necessarily because of Mr. McLellan's
17 conduct, but that's the message that the jury is going to
18 get. He's here, Shaw's there, and they're go to basically
19 say we've investigated this, we've spend hundreds of
20 thousands or dollars for accountants and lawyers. We've
21 concluded that there's an overcharge. That, by itself, is
22 prejudicial.

23 That, by itself, says State Street thinks the
24 pre-trade is a commitment, where our view is, in the absence
25 of a contract, it is what is fair and reasonable from the

1 SSGA lawyers, but they're going to weigh in on the
2 Government's version of the facts. They're going to
3 reinforce it and then they're going to put a dollar figure on
4 it and make it seem like there's some massive monetary fraud
5 here, when all they need to do is say banks have potential
6 risks when clients have a complaint about charges, we
7 investigate, we pay money to investigators, we pay money to
8 lawyers, we look hard at it. And maybe we pay money to
9 clients. I will not be contest that, I will not be
10 contending that that does not satisfy that element of proof.

11 MR. JOHNSTON: The amounts here, Your Honor, are
12 not prejudicial, in light of the overall evidence.

13 THE COURT: How much are the amounts?

14 MR. JOHNSTON: So 300,000 in legal fees. And the
15 only real -- I mean, they -- amount that could exceed just
16 the overcharge, would be basically interest on the 800,000
17 over --

18 THE COURT: So all you're planning to elicit is
19 what Mr. Weinberg described, plus -- and in this case, what
20 did you spend? About 300,000 in legal fees and plus the
21 amount of the -- we paid back and then plus --

22 MR. JOHNSTON: Well, as of last week, they hadn't
23 paid back the money yet. These are ongoing negotiations.
24 But our understanding is one of the negotiation figures is
25 around like whether AXA will get its legal fees and also

1 whether AXA -- or the amount of interest on the 800,000 from
2 2011 to present. So that's --

3 THE COURT: Given his concession, then what's wrong
4 with what he says? I'm going to hold him to that
5 representation.

6 MR. JOHNSTON: Right. Okay -- we can -- I think
7 that we do need to be able to elicit that -- when an employee
8 commits this type of conduct, it's not just, oh, this is like
9 an inconvenience that we have. It's like a big deal. And
10 maybe we don't need to get into like the specifics about this
11 particular deal, like we expect to pay \$15 million and we
12 don't actually --

13 THE COURT: Well, I can understand why it's --

14 MR. FRANK: If I can just briefly address Your
15 Honor's question.

16 THE COURT: Yeah.

17 MR. FRANK: We have to prove that State Street was
18 affected. It's affected by the increased likelihood of loss.
19 Counsel has had the opportunity, we've been begging counsel
20 to stipulate, so we don't have to call this witness, that
21 there's an increased likelihood of loss. The -- what we've
22 gotten back is, what Your Honor heard today, which is we
23 won't contest it, but not contesting it doesn't relieve us of
24 our burden. We still have to prove it affirmatively.

25 If he stipulates, we're relieved of the burden. If

1 he doesn't stipulate, we have to prove it. And proving it in
2 the abstract we may have expenses is not really proving it.
3 We're entitled to show they've actually incurred expenses and
4 they actually expect to incur expenses and the magnitude is
5 approximately in the low 1 to \$2 million range. And given
6 the numbers we've been talking about in this case, to suggest
7 that there's some undue prejudice from the low million dollar
8 range, you know, I just don't think withstands back and
9 forth.

10 MR. WEINBERG: Well, here's the prejudice. The
11 prejudice is that if the witness says that we are going to
12 pay or intending to pay or negotiating to pay the overcharge,
13 plus interest, essentially he's weighing in on the fact that
14 there was an overcharge, which the defendant doesn't concede
15 has been proven at all and it doesn't concede it's been
16 proven to be attributable to McLellan. The element here is
17 satisfied by the generic risk of having to pay. They're
18 already established that they've paid through lawyer fees and
19 investigation fees, or accounting fees. They can say that we
20 have not resolved the matter with AXA, that clearly State
21 Street has the potential to be paying a client to respond to
22 a client's complaint.

23 MR. JOHNSTON: The defense's jury instruction on
24 this element, I believe, includes the term "substantial
25 likelihood," whereas the Government's term was a new or

1 increased risk of loss. I can't recall if they actually, if
2 your suggestion instruction had "actual loss," but I do
3 believe the term is "substantial likelihood" and --

4 THE COURT: Whatever their instruction is, which I
5 don't recall at the moment, I don't think the -- that I'm
6 going to tell the jury that there has to have been an actual
7 loss. It seems to me that it doesn't have -- that the bank
8 does not have to have suffered an actual loss in order to
9 satisfy this.

10 MR. FRANK: But the fact is it has suffered an
11 actual loss. And you know, again, we're happy to stipulate
12 to this point. But if we're not going to be allowed to -- if
13 we're going to be in agreement to stipulate to it, then we
14 think we should be entitled to show that they have actually
15 spent some money on this.

16 MR. WEINBERG: I don't mind the spending the money
17 to investigate, what I mind is the judgments of the
18 investigation that we are going to pay, likely to pay. What
19 they can say is that the client has made -- that we were
20 addressing a client request --

21 THE COURT: They might pay.

22 MR. WEINBERG: And we may pay and it may be the
23 amount the client is requesting, plus interest.

24 MR. FRANK: That's essentially what we're
25 eliciting. What we're eliciting is that we're in

1 negotiations with the client, the negotiations are nearing a
2 conclusion, and we expect to pay them back 800,000, plus some
3 amount above that.

4 MR. WEINBERG: That's the statement that sends the
5 message that we believe there was an overcharge of 800,000,
6 and we're going to pay it.

7 MR. FRANK: Your Honor, all evidence is --

8 MR. WEINBERG: Which is more than the element
9 requires and I'm -- I am representing to the Court, I'm not
10 going to contest the sufficiency in argument.

11 MR. FRANK: Actually, it's not what the element
12 requires. Mr. Weinberg is making the argument that they're
13 doing this as a business decision, not because they face any
14 increased liability. So we need to prove that they're paying
15 the money back because of the increased liability.

16 MR. WEINBERG: I don't -- I do not believe that the
17 element requires proof they're going to repay it. What it
18 requires is proof that they were at risk as a result of an
19 allegation of overcharging them. What the witness should not
20 be able to do is to suggest that State Street believes
21 there's an overcharge, believes that Mr. McLellan is involved
22 and expects imminently to be repaying the exact amount of the
23 overcharge, plus interest. Because that's akin to State
24 Street weighing in, in favor of the Department of Justice
25 position, on an element that nowhere near requires that level

1 of particularity.

2 In fact, I think it's satisfied by a general
3 statement by this man saying, in other matters, any time
4 there's a client complaint, we investigate. That causes --
5 that costs money. In this case, we have investigated. It's
6 cost \$300,000. What other potential monetary issues could
7 State Street have? Well, sometimes if we intended to settle,
8 we would have a monetary interest in settlement. Period.

9 MR. FRANK: Mr. Weinberg is trying to make this a
10 business decision and it's not. They're paying AXA back
11 because of an increased liability and all the witness is
12 going to testify is not, you know, in detail on the
13 negotiations, but there have been negotiations and that
14 they're intending to pay them back.

15 MR. GOLDSTEIN: And it's the intention that goes
16 beyond what the statute requires and sends the impermissible
17 message that State Street has concluded that there was an
18 overcharge and there was wrongdoing.

19 MR. FRANK: State Street has concluded that it
20 faces an increased liability and rather than test that
21 liability in Court, they're paying the client back, because
22 they know they're going to lose.

23 MR. WEINBERG: Because they know they're going to
24 lose is the same as saying we have concluded we were wrong.

25 MR. FRANK: Well, he's not going to say we know

1 we're going to lose. He's going to say we have a liability,
2 we're paying them back.

3 MR. WEINBERG: That's more prejudicial. That's
4 someone who has no personal knowledge having listened to
5 State Street lawyers concluding this liability, which is
6 consistent with the Government's case and inconsistent with
7 the defendant's.

8 MR. JOHNSTON: And a stipulation would remove any
9 prejudice from your client.

10 MR. WEINBERG: What's the stipulation you're
11 seeking?

12 MR. FRANK: That State Street was affected by
13 purposes of the statute.

14 MR. JOHNSTON: Or AXA was affected and that was it.
15 It's one or the other we don't need --

16 MR. WEINBERG: You certainly can't say AXA was
17 affected, because I don't concede there was an overcharge.
18 What I concede is that banks have potential liability and
19 real expenses when clients make complaints, and AXA has made
20 a complaint.

21 MR. FRANK: And stipulate that State Street was
22 affected.

23 MR. WEINBERG: I stipulate State Street has paid
24 legal expenses to investigate.

25 MR. FRANK: Stipulate to the element, or we get to

1 prove it.

2 MR. WEINBERG: Judge, I don't think they can prove
3 it the way they want to prove it. I think it's terribly
4 prejudicial and completely unnecessary.

5 THE COURT: Okay. I understand the dispute to
6 be -- that there to be no objection to eliciting that State
7 Street has spent money on lawyers and accountant-type people,
8 in investigating the AXA matter, and the dispute I understand
9 is whether and -- and they can say anything about what they
10 might pay, with respect to sort of settlement of claims from
11 AXA. And to the extent they can say how much it is, the
12 reason that they're paying for it. And that's a fair
13 characterization of where you both are?

14 MR. WEINBERG: Yes.

15 MR. JOHNSTON: Yes.

16 THE COURT: Okay. All right. I just want to look
17 at the instruction.

18 David.

19 (The Court and the law clerk confer.)

20 THE COURT: You guys certainly do raise complicated
21 fine evidentiary lines. So okay. I'm going to permit the
22 Government to elicit the amount of -- that they reasonably
23 anticipate further paying the AXA element to AXA, whatever
24 that is. That seems to me within -- that seems to me a
25 balance, in all the considerations that I can think about.

1 That seems reasonable. But I do share -- I am concerned
2 about having sort of the thumb of State Street having done a
3 big like -- "we had to pay it" is concerning and -- because
4 it raises the question of their own independent -- it's sort
5 of like their opinion that this was wrong, which is
6 different. That isn't necessarily necessary for loss. I
7 mean, it's not necessary for loss, I don't think.

8 So I think that the closer you hue to the line
9 of -- on the other hand, I think it's unfair to not allow
10 them -- to allow the Government -- it's unfair not, in the
11 balance of all the evidentiary considerations here, to not
12 allow the Government to put in the amount of the -- that they
13 might pay in settlement and that there might be something
14 there, given what the potential different inferences are, in
15 relationship between the different issues.

16 So but the more -- I think you should stay away
17 from we have to pay it. Like this is what we reasonably
18 anticipate paying AXA, something in this range. Or we
19 reasonably anticipate paying AXA money and it could be as
20 much as X, 1.2, or whatever it is. And it's in process. We
21 think we're going to pay them something, but we haven't yet.

22 MR. FRANK: So we understand that, Your Honor, and
23 that's perfectly acceptable to us. I would just ask that if
24 the defense, then, goes on cross-examination into, well, this
25 is a business decision and you might be paying this back

1 simply as a business decision, we think then they will have
2 opened the door to the fact that State Street views this as a
3 liability.

4 THE COURT: Are you likely to do that?

5 MR. WEINBERG: No, I'm not likely to do it.
6 However, I do think it puts us in an impossible situation of
7 the Government putting in we've investigated this, we've paid
8 300 grand to investigate and now we are anticipating paying
9 back the exact amount of overcharge plus interest.

10 THE COURT: I'm open to telling the jury, as a
11 limiting instruction, subject to what you'll tell me, that to
12 the extent they've -- that something along the lines of that
13 this is -- something addressing the notion that whatever
14 State Street's view of it is not, like, relevant evidence as
15 to whether there was, in fact, an overcharge or a crime or a
16 fraud or anything like that -- to separate that out, I don't
17 know if you want that or not. I understand there's this fine
18 line between the different issues. So I'm not going to do
19 that unless you want it, but I'm open to it if you want it.

20 MR. WEINBERG: I think what I'm open to is
21 discussing with the Government whether or not -- preserving
22 my objection, because I don't want to stipulate and haven't
23 stipulated, but I do think this is terribly prejudicial, the
24 combination of we've investigated through lawyers and money
25 and now we're about to or anticipate paying the exact amount

1 the Government alleges as an overcharge, plus interest, is --
2 there's no other inference a reasonable jury would draw,
3 except State Street has investigated on its own and concluded
4 the Government's right and the defendant is wrong and there
5 was an overcharge. And we're going to go pay over a million
6 dollars to try to make it right.

7 It's akin to a plea of guilty, which *Crawford* says
8 is not supposed to be admitted against the defendant. This
9 is akin to a plea of guilty. Yes, it doesn't have the
10 criminal intent and it doesn't have the criminal label, but
11 to a jury, it's the thumb of State Street, again, is on the
12 side of the Government. It's sending a message that we
13 believe the Government is right, AXA was wronged. AXA was
14 right, there was an overcharge. We've investigated it, it
15 cost us 300 grand, now we're going to go pay them the 800
16 plus.

17 So I object to it, but I do want to try to reduce
18 the prejudice by seeing whether or not there's a stipulation
19 that the State Street witness would testify more generically,
20 that State Street, when there's a complaint by a client such
21 as AXA, pays money to lawyers and accountants to investigate
22 and potentially pays money to a client that believes they
23 were overcharged. That to me satisfies their element. I
24 combine it with my commitment not to dispute it on final
25 argument. I think that reduces the prejudice. I wish I

1 didn't have to stipulate, but I think I need to in light of
2 the Court's evidentiary rulings.

3 THE COURT: Okay.

4 MR. WEINBERG: So could we have five minutes to see
5 if we can work something out?

6 THE COURT: Absolutely.

7 MR. FRANK: I can tell you right now, that
8 stipulation as outlined doesn't satisfy our view of our
9 burden, especially in light of the arguments Counsel has
10 already made to the jury.

11 THE COURT: He wants to talk to you.

12 MR. FRANK: I'm happy to do that, but just so the
13 Court is aware, counsel has already made arguments to the
14 jury that -- about business decisions and paying people back
15 as a business decision and he's making that argument with
16 respect to his own client's decision to reimburse Royal Mail
17 a million dollars. And that was a business decision and this
18 simply reinforces the defense argument --

19 THE COURT: Pause. The two of you, I'm perfectly
20 content to give you a few minutes to talk to each other.

21 You had two other matters, do they relate to today?

22 MR. FRANK: They relate to tomorrow's testimony.

23 THE COURT: All right. So we can talk about them
24 after. We still anticipate, even if you do everything you
25 think you're going to do, that we finish before 1 o'clock

1 today?

2 MR. FRANK: Very much before 1 o'clock.

3 THE COURT: Okay.

4 MR. GOLDSTEIN: Your Honor, I should at least raise
5 the fact that I do believe I have a good faith on the
6 ConvergEx issue. I do believe I have a good faith to inquire
7 of the witness in terms of the model that ConvergEx have been
8 employing and that that was a subject matter of discussion
9 during the interview.

10 MR. FRANK: I can represent to the Court, the
11 witness will testify that did not come up in the interview.

12 THE COURT: He can ask him. The witness can say it
13 didn't.

14 Okay. Five minutes or so? I'll just wait here.

15 (Counsel confers.)

16 MR. GOLDSTEIN: Mr. Weinberg is reminding me in
17 terms of -- not to limit my -- I have the ability to inquire
18 into ConvergEx not simply because of the discussion that
19 happened during the interview, but because the Government is
20 relying on the ConvergEx model as a -- in a broader fashion,
21 in terms of the evidence it has admitted through the
22 spreadsheet. And so having introduced the subject matter of
23 ConvergEx into this trial -- and this is actually a point of
24 contention, Your Honor.

25 I mean, the Government wants it both ways. The

1 Government wants the jury to conclude there was something
2 wrong with ConvergeEx, therefore, there was something wrong
3 with State Street's model. The fact of the matter is,
4 they're not apples to apples. ConvergeEx was different. So
5 any observations by State Street personnel about the
6 ConvergeEx model is not therefore a commentary on what State
7 Street was doing. ConvergeEx was much different than State
8 Street. So the Government is giving the jury a misleading
9 picture, in terms of --

10 THE COURT: So what do you want to do with the
11 witness that might implicate that?

12 MR. GOLDSTEIN: Well, I think I should be able to
13 elicit from the witness what ConvergeEx was. That ConvergeEx
14 is not the State Street model. ConvergeEx was US-based trades
15 that --

16 THE COURT: So that would be discussion that would
17 be separate -- that would be evidence separate from what they
18 discussed?

19 MR. GOLDSTEIN: Yes.

20 THE COURT: Okay.

21 MR. GOLDSTEIN: Well, if he denies discussing it, I
22 have certain questions I'll ask him about the discussion. If
23 he denies it, I then think I should be able to elicit from
24 the witness what happened in ConvergeEx and distinguish what
25 happened in ConvergeEx from the allegations in this case.

1 THE COURT: That would -- so I guess, there's a
2 couple of questions about that. One is, relevance. You
3 object from a relevance perspective?

4 MR. FRANK: Absolutely.

5 THE COURT: Okay. Why?

6 MR. FRANK: Because the relevance issue is the
7 witness's state of mind. We have carefully limited our
8 questioning on the ConvergeEx issue to the -- to the
9 conspirator's state of mind and that's all we're eliciting.
10 In fact, what we're elicited today from the agent has nothing
11 to do with ConvergeEx at all.

12 THE COURT: No, I understand that's a scope or
13 what-have-you questions --

14 MR. FRANK: Right. But all we've elicited is their
15 state of mind about what they thought was going on at
16 ConvergeEx. That's all that ConvergeEx is relevant for, that
17 they believed it was applying hidden spreads, the mechanism
18 is not relevant. They didn't know the mechanism. The
19 witness will testify that they didn't discuss any mechanism.

20 MR. GOLDSTEIN: Well, there is no testimony
21 regarding Mr. McLellan's state of mind regarding ConvergeEx.

22 THE COURT: No, but the evidence with respect to
23 ConvergeEx is whatever is in those e-mails and spreadsheet and
24 discussion between him and Pennings that came in, which is
25 relevant to his -- in other words, whatever that says about

1 whatever he thought about it.

2 MR. GOLDSTEIN: The fact that they're discussing
3 ConvergEx, Your Honor, means that they have an idea, in terms
4 of what's happening from ConvergEx. So evidence of what was
5 really happening with ConvergEx is a link and a chain to show
6 the defendant knew what was going on with ConvergEx.

7 THE COURT: But you don't know what else -- there's
8 no basis right now to know that he knew anything. He may
9 have known a lot about ConvergEx, but there's nothing in the
10 record to show that he would know anything about ConvergEx
11 other than what's in that e-mail and whatever was discussed
12 today.

13 MR. FRANK: And, in fact, he affirmatively denied
14 in the interview that he knew anything about how ConvergEx
15 was applying spreads.

16 MR. GOLDSTEIN: That's not my understanding of the
17 interview. I'm entitled to ask --

18 MR. FRANK: He's entitled to ask him whether --
19 what he said and what was discussed. The issue is he's not
20 entitled to delve beyond the scope of what was discussed in
21 the interview.

22 MR. GOLDSTEIN: And that's Mr. Frank's opinion, but
23 when they want to inject the subject of ConvergEx and they
24 want to --

25 THE COURT: I'll tell you what, when you -- since

1 some of this is foundation, if you want to go beyond what
2 he's -- the discussion, into just generally ConvergeX, okay,
3 come to -- we'll have a sidebar and then we'll talk about it
4 and then I'll have a better understanding of where we are,
5 because I'll have heard the witness and --

6 MR. GOLDSTEIN: Very well.

7 THE COURT: All right. You want a couple of
8 minutes to talk to each other?

9 MR. WEINBERG: Yes, Your Honor.

10 THE COURT: How long do you want?

11 MR. WEINBERG: I think we'll know within three or
12 four minutes whether there's the basis for a stipulation.

13 THE COURT: Do you want me to leave the courtroom?

14 MR. WEINBERG: No. I can march over to the
15 Government table and see what they --

16 MR. FRANK: We'll meet him halfway in the
17 militarized zone.

18 MR. WEINBERG: -- negotiate.

19 (Court in recess at 9:01 a.m.

20 and reconvened at 9:06 a.m.)

21 MR. WEINBERG: Here's where we're at. So I
22 understand courts don't get involved in stipulations, but
23 respectfully, the Court's evidentiary decisions have led to
24 the discussions and we're very close.

25 THE COURT: Yes.

1 MR. WEINBERG: I am prepared to stipulate, in the
2 language of the statute, that a State Street witness would
3 testify that, as a result of the alleged conduct in Count 6,
4 State Street, a financial institution, has been affected.
5 That, in essence -- and I also will not dispute -- somehow
6 I'm not going to argue or stipulate to that it's a lie and I
7 don't believe it.

8 It's stipulating that there would be testimony
9 that's undisputed. It's the way I believe stipulations
10 should come in, because Mr. McLellan could stipulate and know
11 that a witness would say it. But he doesn't stipulate and
12 know that State Street, in fact, was affected. And that's
13 the way I think stipulations should be drafted from a
14 perspective of being consistent with the defendant's
15 agreement.

16 The Government wants a stipulation that the
17 defendant agrees that State Street, a financial
18 institution --

19 THE COURT: Was affected. They want to -- so you
20 want a stipulation, this is what the evidence is. In a
21 summary form, the evidence is that they were affected.

22 MR. WEINBERG: Right.

23 THE COURT: And they want a stipulation that says
24 the element is satisfied.

25 MR. WEINBERG: I'm not disputing that the element

1 is satisfied by that stipulation. There will be no
2 counterevidence. I'm not going to cross-examine Mr. Shaw to
3 try to backdoor or dilute the stipulation, so they get what
4 they want as a practical matter. They have satisfied this
5 element. There will be no dispute on final argument. And
6 the only reason I'm inviting the Court to weigh in is that
7 this is a way to balance the prejudice --

8 THE COURT: Can you tell me, again, what you want
9 to stipulate to, the words of it?

10 MR. WEINBERG: Yeah, essentially, the same words
11 they have, but I want to put the qualifier that a witness
12 from State Street would testify that State Street is a
13 financial institution and was affected by the alleged
14 conduct.

15 THE COURT: Do you want to put in the word
16 "undisputed"? In other words, that you have -- well, first
17 of all, you can all agree to whatever you want, I'm just
18 throwing out there that are you willing to say that there's
19 no dispute? Or you don't want to go that far?

20 MR. WEINBERG: I don't want to be in a position of
21 any way reinforcing the allegations in Count 6, which I
22 contend to be both weak and improperly joined to Counts 1 to
23 5, to reinforce it with the defendant admitting that State
24 Street has been prejudiced by conduct that we contest didn't
25 occur.

1 So this is a way for the Government to satisfy the
2 element. I am not going to dispute it in front of a jury.
3 I'm not disputing it on final argument. I'm not
4 cross-examining anybody to try to, in any way, reduce the
5 effect of the stipulation. It is simply one of two forms of
6 stipulation. It's the form I think is more consistent with
7 the fact that we're asking the defendant to stipulate to an
8 element. We're stipulating, essentially, that the Government
9 evidence would satisfy that evidence, that stipulation, and
10 to avoid the prejudice, or most of the prejudice, we're
11 stipulating that a State Street witness would testify to
12 whatever the language they would otherwise want in a factual
13 stipulation.

14 THE COURT: You're saying that the defendant
15 stipulates that a witness from State Street would testify
16 that as a result of the conduct alleged in Count 6, State
17 Street was exposed to -- State Street, a financial
18 institution, was exposed to loss and a -- and/or realistic
19 prospect of loss.

20 MR. WEINBERG: No, I think we would stipulate to
21 the language the Government wants, which is the statutory
22 language that State Street has been affected by the alleged
23 conduct in Count 6.

24 THE COURT: Affected. You would testify that a
25 witness from State Street would testify that it was affected

1 by the conduct alleged.

2 MR. WEINBERG: Which satisfies both parts of their
3 statutes of limits element that State Street was a financial
4 institution and was affected. That's all they need. The
5 rest of it is just sheer prejudice.

6 MR. FRANK: Your Honor, either -- we believe we
7 either are entitled to put in the evidence for the jury to
8 conclude it was affected or that the element should be
9 removed. But this walking of a fine line doesn't actually
10 remove the element.

11 THE COURT: I guess the question is, as a general
12 proposition, Mr. Frank, you are correct. In other words, you
13 are ordinarily entitled to the evidence and as a general
14 matter, that -- you know, this isn't an *Old Chief* situation.
15 And the one question is -- to think about is balancing the
16 consideration that -- of avoiding the sort of conclusory --
17 fairly giving you what you need, but avoiding the imprimatur
18 of a conclusion of State Street as to the merits of Count 6,
19 which I know you're not trying to backdoor.

20 MR. FRANK: We want to remove State Street from the
21 equation. He wants to put State Street's conclusion into the
22 equation, actually, through his stipulation. State Street
23 concluded that it was affected. We want to remove that.
24 Just take the element out. The parties stipulate that, for
25 purposes of the statute, it was affected. It's neutral and

1 it removes that element. But what he wants to do now,
2 actually, is to say State Street has concluded it was
3 affected, which doesn't remove the element and actually
4 doesn't remove the prejudice he's complaining about.

5 THE COURT: You don't have to submit the element.

6 MR. FRANK: It just reduces the weight of our
7 evidence is what it does.

8 MR. WEINBERG: And there's another way to do this,
9 which is that we could stipulate to the element, but not have
10 the stipulation go to the jury. Instead the Court can
11 instruct the jury, there's no dispute as to one of the
12 elements in Count 6, that being that State Street was a
13 financial institution that was affected by the alleged
14 conduct.

15 MR. FRANK: Your Honor, if the Court instructs the
16 jury that there is no dispute, and therefore, they have to
17 find that to be proved, that element, that State Street was a
18 financial institution and was affected, no dispute there.

19 MR. WEINBERG: I think that's the way to do it,
20 Judge.

21 THE COURT: Fine. You both agree?

22 MR. WEINBERG: But do it as part of the Court's
23 instructions.

24 THE COURT: The instructions, just when I get there
25 to instruct them, as to element 5, or I don't know what

1 element number it is, but whatever element number is this,
2 and I instruct you to find that that's -- based on the
3 agreement of the parties, that's true and you should find
4 that and then you -- and then you, the jury, figure out the
5 rest. Then that satisfies --

6 MR. FRANK: Then they just have to figure out the
7 wire fraud element.

8 THE COURT: All the other elements of the --
9 whatever they are at the moment. I'm not sure, but yeah, so
10 all the other elements of the count.

11 MR. FRANK: Yeah. While we're at it, you can just
12 instruct them on those, as well.

13 MR. WEINBERG: And then add that Mr. McLellan is
14 responsible for the entire acts of --

15 MR. FRANK: Stipulated.

16 THE COURT: Fine. All right. So that solves that.
17 Okay. Are you ready to go?

18 MR. FRANK: Could we have a moment to tell the
19 witness, actually?

20 THE COURT: Yes.

21 MR. FRANK: Thank you, Your Honor.

22 (Court in recess at 9:16 a.m.
23 and reconvened at 9:17 a.m..)

24 MR. FRANK: We're ready to go, Your Honor.

25 THE COURT: Okay.

1 Maria, go get the jury. Thank you.

2 Who's first this morning?

3 MR. FRANK: Garret Trombly, he's reading in the
4 unobjected-to exhibits.

5 MR. WEINBERG: And is he reading into -- the
6 objected-to exhibits that the Court has ruled on?

7 MR. FRANK: Yes.

8 MR. WEINBERG: Judge, will you take another look at
9 the 159, which is the City of Philadelphia e-mail, that Mr.
10 McLellan --

11 THE COURT: I recall that one. What's the issue?

12 MR. WEINBERG: It's just a -- if I can use the term
13 "apples and oranges." It's a US client, it has ERISA-type
14 protections. It has nothing to do with the European trades.
15 It just creates --

16 THE COURT: Why do you really need it?

17 MR. FRANK: First of all, there's an AXA count in
18 the indictment.

19 THE COURT: There's a what?

20 MR. FRANK: There are American trades at issue in
21 the indictment. It goes to his state of mind. He's familiar
22 with State Street's business model. He distinguishes what
23 they do in FX from what they do in fixed income. It's very,
24 very clear that -- and he's on notice, that State Street
25 fully discloses all --

1 (The jury enters the courtroom.)

2 THE COURT: Good morning, ladies and gentlemen. I
3 hope you had a nice weekend. Nobody did any independent
4 research, nobody discussed the case, anything like that, you
5 followed the instructions. Good. All right.

6 So I apologize for beginning a little bit late.
7 I've been talking to the lawyers, who actually got here
8 early, to try to iron out a few issues, see if we couldn't
9 keep this moving on or ahead of schedule. And I think we've
10 narrowed things a little. It took us a few minutes longer
11 than I thought, so that's why the delay in starting.

12 So call your first witness.

13 MR. FRANK: Thank you, Your Honor, the Government
14 calls Special Agent Garrett Trombly.

15 **SPECIAL AGENT GARETT TROMBLY**

16 having been duly sworn, testified as follows:

17 **DIRECT EXAMINATION BY COUNSEL FOR PLAINTIFF**

18 BY MR. FRANK:

19 **Q.** Good morning, Special Agent.

20 **A.** Good morning.

21 **Q.** Could you tell us your name, please, and spell it?

22 **A.** My name is Garrett Trombly, G-a-r-e-t-t, T-r-o-m-b-l-y.

23 **Q.** Thank you. Where do you work?

24 **A.** I work for the FBI.

25 **Q.** What do you do for the FBI?

1 **A.** I investigate foreign corruption and money laundering.

2 **Q.** And you're a special agent?

3 **A.** I am.

4 **Q.** So the squad that you're assigned to is foreign
5 corruption and money laundering?

6 **A.** Correct.

7 **Q.** Have you had any involvement in the investigation of the
8 defendant in this case?

9 **A.** I have. I have participated in some interviews and
10 reviewed some documents.

11 **Q.** Are you the case agent for the case?

12 **A.** I am not.

13 **Q.** And what is the case agent? What does that mean?

14 **A.** The case agent is the primary individual responsible for
15 the investigation and coordination with the US Attorneys
16 Office.

17 **Q.** Fair to say you've had more limited involvement?

18 **A.** Very much so.

19 **Q.** Okay. I just want to go through some documents with you
20 and have you read them for the record; is that all right?

21 **A.** Certainly.

22 **Q.** If we could look at Exhibit -- well?

23 MR. FRANK: Well, first of all, Your Honor, the
24 Government would offer Exhibits 98, 99, 111, 112, 159, 176,
25 181, 189, 190, 209, and 211.

1 THE COURT: Give me one moment.

2 Can you read the list back again? You read it
3 slowly and I appreciate it, Mr. Frank, but just again so I
4 can --

5 MR. FRANK: 98, 99, 111, 112, 159, 176, 181, 189,
6 190, 209, and 211.

7 THE COURT: All right.

8 MR. WEINBERG: We would just preserve the
9 objections that we had previously discussed.

10 THE COURT: Yes. Subject to that, those are
11 admitted.

12 MR. FRANK: Thank you.

13 (Exhibit Nos. 98, 99, 111, 112, 159, 176, 181, 189,
14 190, 209, and 211 admitted into evidence.)

15 MR. FRANK: Could we look at Exhibit 189, please.
16 And Erin, if you could just highlight the bottom e-mail.

17 MR. WEINBERG: Your Honor, please, has the Court
18 many made a final ruling on this?

19 THE COURT: Yes.

20 MR. WEINBERG: Okay. Thanks.

21 BY MR. FRANK:

22 **Q.** Special Agent, can you tell us the date of this e-mail?

23 **A.** It's dated June 14, 2011.

24 **Q.** And who is it from?

25 **A.** It's from Daniel Falkowski.

1 Q. And if you could just -- if we could just turn to the
2 signature block.

3 MR. FRANK: Which is on the next page there.

4 BY MR. FRANK:

5 Q. Can you tell us who Daniel Falkowski is?

6 A. He's an investment associate working for the City of
7 Philadelphia Board of Pensions and Retirement.

8 Q. And if we just turn back to the subject, the header of
9 the e-mail. Who is the e-mail addressed to?

10 A. Eric Carangelo, Ross McLellan, and Elijah Rawlyk.

11 Q. And what's the subject?

12 A. "Follow-up."

13 Q. Okay. Could you read the body of the e-mail for the
14 record, please?

15 A. Certainly.

16 "Eric, Ross, and Elijah, it was nice meeting you
17 all earlier. I found the paragraph contained within the RFP
18 that mentioned proprietary trading. Please see below. This
19 was the revised paragraph from your legal counsel.

20 "39. Does your firm or an affiliate have a company
21 or proprietary account in which you may be the other side of
22 a given transaction? If so, what safeguards can you describe
23 that ensure you are placing the goals of the client ahead of
24 your firm's capability to book revenue in this manner?

25 "State Street, as a firm, has only limited

1 proprietary trading activity. The proprietary trading
2 activity of our US business is currently limited to State
3 Street Bank and Trust Company's activities as a dealer of
4 fixed income, currency, and interest rate derivatives. State
5 Street does not have a proprietary equity trading desk.

6 "The types of trades that we may execute on behalf
7 of transition management clients as part of a transition
8 management are equity trades, future trades, fixed income
9 trades, and foreign currency trades. Equity and futures
10 trades are executed on an agency basis. With respect to
11 fixed income trades, we act as riskless principal, except
12 under certain circumstances, where we trade fixed income as
13 agent. Riskless principal trading means that we locate a
14 dealer to buy or sell the fixed income security and we
15 simultaneously execute corresponding buy-and-sell
16 transactions with the dealer and the client, with the only
17 difference in price being the spread on such trades, agreed
18 with the client in advance.

19 "State Street's proprietary fixed income dealing
20 desk is not one of the dealers with which we would executed
21 fixed income trades for the City of Philadelphia. Instead,
22 we would obtain quotes for only third party dealers. All
23 spreads and commissions on equity, futures, and fixed income
24 trades for a transition assignment are fully disclosed and
25 agreed prior to the mandate.

1 "In addition, to the extent directed by a client,
2 State Street foreign currency trading desk could act as the
3 counterparty or dealer with respect to foreign exchange
4 trades, or we could agree to execute such trades on an agency
5 basis with a third party dealer. To the extent that State
6 Street acts as a counterparty or dealer on foreign exchange
7 trades, it could make a profit in the form of a spread,
8 charged by it on such transactions."

9 **Q.** Thank you and if you could -- if we could now take a look
10 at the response to this e-mail. Special Agent, can you tell
11 us who the response was from?

12 **A.** It's from Ross McLellan.

13 **Q.** And the date?

14 **A.** Tuesday, June 14, 2011.

15 **Q.** Could you read the response?

16 **A.** "Dan, thanks for sending this over, certainly something
17 we need to clarify in future responses. Obviously, our FX
18 desk profits from trading, as do all bank's FX. However, as
19 we are a fiduciary in our transition business, we exclude
20 State Street as a counterparty. Similarly, as a bank, we use
21 interest rate swaps and derivatives to hedge our balance
22 sheet. Again, nothing relating to the TM business. Thanks
23 again for your time today and look forward to hearing from
24 you in the future."

25 **Q.** Thank you. Can you look at Exhibit 99, please. And

1 could you read -- could you tell us who this e-mail is from
2 and who it's to?

3 **A.** The e-mail is from Edward Pennings, it's sent to Ross
4 McLellan.

5 **Q.** What's the date?

6 **A.** February 24, .2011.

7 **Q.** What are the attachments?

8 **A.** "Final signed TMA.pdf.zip, and periodic notice.pdf.zip."

9 **Q.** And what does the e-mail say?

10 **A.** "FYI, NTMA agreement again for your review."

11 MR. FRANK: And could we just take a look at the
12 first attachment and the next page. Could you enlarge the
13 text.

14 BY MR. FRANK:

15 **Q.** What's the date of this letter?

16 **A.** October 10, 2007.

17 **Q.** And what does the first sentence say?

18 **A.** "With reference to the above, I now enclose the
19 transition management services framework agreement, dated as
20 of 9th October, 2007."

21 **Q.** If we could look at the next page. Could you tell us
22 what it says at the top?

23 **A.** "TRANSITION MANAGEMENT SERVICES FRAME WORK AGREEMENT,
24 dated the 9th day of October, 2007."

25 **Q.** And if we can look at the next attachment, please. Can

1 you tell us what this document is? It says at the top.

2 **A.** It's a contract order for services.

3 **Q.** And does the header of the page -- what does it say on
4 the header of the page?

5 **A.** "National Treasury Management Agency."

6 **Q.** Thank you. Can we look at Exhibit 98, please.

7 MR. FRANK: And Erin, if you can move to the second
8 page, please, and the bottom e-mail.

9 BY MR. FRANK:

10 **Q.** Can you tell us who this is from and who this is to?

11 **A.** It's from Chris Carlin. It's to Paul McGee.

12 **Q.** And the date?

13 **A.** February 24th, 2011.

14 **Q.** Can you read the e-mail, please?

15 **A.** "Paul, for NTMA, are we invoicing them or charging a
16 com?"

17 **Q.** And if we go to the e-mail up from that, the response?
18 Can you tell us how Mr. McGee responded?

19 **A.** "Invoicing after the trade."

20 **Q.** Can we go to the next e-mail up, please. Does this
21 appear to be an e-mail back from Mr. Carlin back to
22 Mr. McGee?

23 **A.** It does.

24 **Q.** What does it say?

25 **A.** "Why are the fixed income trades being booked with coms,

1 then?"

2 **Q.** And can you tell us, if we look at the next e-mail, who's
3 that from?

4 **A.** It's from Mr. McGee.

5 **Q.** To?

6 **A.** Chris Carlin.

7 **Q.** What does he say?

8 **A.** "It's on a need to know basis. Speak with Ross. He
9 knows the strategy here."

10 **Q.** If we could look at the next e-mail up. Who's it from?

11 **A.** Chris Carlin.

12 **Q.** And who is it to?

13 **A.** Ross McLellan.

14 **Q.** What is the date?

15 **A.** February 25, 2011.

16 **Q.** Can you read the e-mail, please.

17 **A.** "Care to share? I want to make sure I tell finance the
18 right amount to accrue. Looks like we are recognizing
19 revenues on the fixed income and futures. McGee referred me
20 to you."

21 **Q.** And can you tell us, if we look at the top e-mail, does
22 this appear to be a response from the defendant?

23 **A.** Yes.

24 **Q.** What does he say?

25 **A.** "1.75 BPS on value traded. Will also have revenue

1 potentially from ETF redemption. We'll call you in a few."

2 **Q.** Thank you. Can we look at Exhibit 211, please. And if
3 we could look at the bottom --

4 MS. LEAHY: I have it as a pdf on here. Can I pull
5 it up?

6 MR. FRANK: Sure. Your Honor, I have been advised
7 that I neglected to admit the attachments to Exhibit 99,
8 which are 99.1, and 99.2, which we just read. I would offer
9 those for the record, as well as the attachment to
10 Exhibit 181.

11 THE COURT: Any objection to those, Mr. Weinberg?

12 MR. WEINBERG: Only the objections that your Honor
13 has reserved.

14 THE COURT: Over -- they're admitted.

15 MR. FRANK: Thank you.

16 (Exhibit Nos. 99.1 and 99.2 admitted into
17 evidence.)

18 MR. FRANK: Okay. Erin, if you can move down to
19 the bottom of the page -- no, not that page. There we go.
20 And if you could just please enlarge that.

21 BY MR. FRANK:

22 **Q.** Mr. McLellan -- Mr. McLellan. Special Agent Trombly,
23 could you tell us who this e-mail is from and who it is to?

24 **A.** It's to Peter Weiner to Ross McLellan and Kevin Walker.

25 **Q.** What is the date?

1 **A.** February 18, 2011.

2 **Q.** Can you read the first sentence, please?

3 **A.** "The investment team at AXA asked us to call the
4 Treasurer, but they do not want him to know that we were told
5 of the trade. SSGA wants a transition manager involvement."

6 **Q.** And the next sentence?

7 **A.** "Treasury has a longstanding relationship with JPM."

8 **Q.** Okay. And if we can move up to the top e-mail. Who's
9 that from?

10 **A.** It's from Ross McLellan.

11 **Q.** Who's that to?

12 **A.** Kevin Walker.

13 **Q.** The date?

14 **A.** February 19, 2011.

15 **Q.** And what's the text?

16 **A.** "Let's chase this Tuesday morning."

17 **Q.** Thank you. And if we can look at Exhibit 209, please.
18 And if we could look at the bottom e-mail.

19 Who's that from?

20 **A.** Carla Byer.

21 **Q.** And if you can just read her title from the signature
22 block?

23 **A.** Vice President, AXA Equitable.

24 **Q.** And if you can just read the first two sentences of the
25 e-mail, please.

1 **A.** "Kevin, I left you a voicemail, as well. We have decided
2 to go with SSGM Transition Management for the transition of
3 the three portfolios."

4 **Q.** Thank you. If we could look at the next e-mail up,
5 please.

6 Who is this from?

7 **A.** Kevin Walker.

8 **Q.** Who is it to?

9 **A.** Ross McLellan and Peter Weiner.

10 **Q.** What's the date?

11 **A.** March 1, 2011.

12 **Q.** What's the subject line?

13 **A.** It's a forward, "AXA Equitable transition."

14 **Q.** And can you read the text, please?

15 **A.** "Winner, winner."

16 **Q.** And if you can just look at the response, who is the
17 response from?

18 **A.** Peter Weiner.

19 **Q.** Who is it to?

20 **A.** Kevin Walker and Ross McLellan.

21 **Q.** And what does he say?

22 **A.** "Fantastic."

23 **Q.** Thank you. If we can look at Exhibit 111, please. And
24 if we could look at the second page, bottom e-mail.

25 Who's that from?

1 **A.** Kevin Walker.

2 **Q.** Who is that to?

3 **A.** Steven Finocchi, Peter Weiner, and Ross McLellan.

4 **Q.** What is the date?

5 **A.** March the 1st, 2011.

6 **Q.** Can you read the text, please?

7 **A.** "Are you guys available at 2:30 Eastern tomorrow to touch
8 base on AXA starting Thursday?"

9 **Q.** And if we can look at the response. Who is the response
10 from?

11 **A.** Ross McLellan.

12 **Q.** What does he say?

13 **A.** "Yes, please send invite."

14 MR. FRANK: If we can look at the next e-mail up
15 please, on the prior page, yes.

16 BY MR. FRANK:

17 **Q.** Who is that from?

18 **A.** Steve Finocchi.

19 **Q.** Who is that to?

20 **A.** Kevin Walker.

21 **Q.** Who is it copied to?

22 **A.** Tom Clemmenson.

23 **Q.** And can you read the text, please?

24 **A.** "Hi, Kevin. Unfortunately I am out today because I am
25 attending a funeral."

1 Q. And if we look at the continuation on the next page.

2 A. "Tom, could you please help out Kevin? Thanks, Steve."

3 MR. FRANK: And if we could go back to the first
4 page, Erin, and read the response.

5 BY MR. FRANK:

6 Q. You see this is from Kevin Walker to Ross McLellan and
7 Peter Weiner.

8 A. Correct.

9 Q. What does he say?

10 A. "Steve F. out today. Is this a conversation we want to
11 have with Tom?"

12 Q. And if you want to look at the response. Who's the
13 response from?

14 A. Ross McLellan.

15 Q. What does he say?

16 A. "Sure. Let me discuss coms."

17 Q. Thank you. If we look at Exhibit 112, please. And if we
18 could look at the bottom of the page. Who is it from?

19 A. Chris Carlin.

20 Q. And who is in the recipient line?

21 A. Kevin Walker, Peter Weiner, copied to Thomas McNichol,
22 and Kevin Miller.

23 Q. What is the text?

24 A. "I hear AXA is coming in quickly. Where do we stand with
25 their contract? Let me know if legal needs to work on

1 anything quickly."

2 **Q.** Can we look at the next e-mail up, please. Who is it
3 from?

4 **A.** Kevin Walker.

5 **Q.** Who is it to?

6 **A.** Peter Weiner and Ross McLellan.

7 **Q.** Chris Carlin is not on this e-mail?

8 **A.** Correct.

9 **Q.** Neither is Thomas McNichol or Kevin Miller?

10 **A.** Correct.

11 **Q.** Could you read text, please?

12 **A.** "What to do."

13 **Q.** And the subject line?

14 **A.** "AXA contract."

15 **Q.** Thank you. And could we look at the response, please.
16 Who is it from?

17 **A.** Ross McLellan.

18 **Q.** Who is it to?

19 **A.** Kevin Walker and Peter Weiner.

20 **Q.** The text?

21 **A.** "Have they sent us the LOD?"

22 **Q.** And if we look at the response. And who's this from?

23 **A.** Kevin Walker.

24 **Q.** Who is it to?

25 **A.** Ross McLellan and Peter Weiner.

1 Q. Can you read the first sentence, please?

2 A. "Not yet, I left a voicemail for Carla this morning,
3 asking her to send it to you and I."

4 Q. Thank you. And can we look at 176, please.

5 MR. FRANK: And Erin, if you can move ahead to the
6 third page -- actually, you're going to have to move up just
7 for one moment, just to the very bottom there.

8 BY MR. FRANK:

9 Q. Can you see who this e-mail is from?

10 A. Ross McLellan.

11 Q. And the date?

12 A. August 2, 2011.

13 Q. And if we look at the next page, who is it to?

14 A. Chris Carlin.

15 Q. And what is the text?

16 A. "Why is Peter calling me about AXA?"

17 Q. And it says "sent from my iPhone."

18 Do you see that?

19 A. Yes.

20 Q. Can we look at the response, please. Could you read the
21 response, please.

22 A. "The auditors picked them for review and there is no
23 contract. He just left me a message that we should spin it
24 as a brokerage trade from the IM."

25 Q. Can we look at the response, please.

1 MR. FRANK: And Erin, if you can just go to the
2 prior page so we can see who the response is from.

3 BY MR. FRANK:

4 Q. Who's it from?

5 A. It's from Ross McLellan.

6 Q. To Chris Carlin?

7 A. Correct.

8 Q. And if we can look at the text, again, please. What does
9 he say?

10 A. "That's what AXA wanted. Why is he calling me?"

11 Q. And if we can look at the final e-mail from Chris Carlin.
12 Do you see that it's from Chris Carlin to Ross McLellan?

13 A. I do.

14 Q. Can you read the text please?

15 A. "Okay. I will spin it that way. Hope we get dinged. I
16 told Peter to let you enjoy your vacation, he was calling
17 you, because I sent you both an e-mail on it."

18 Q. Okay. Can we look at Exhibit 181, please. Can you tell
19 us who this is from and who it's to?

20 A. It's from Ross McLellan to Mark Hansen.

21 Q. The date?

22 A. August 23, 2011.

23 Q. And you see that's a Tuesday?

24 A. Yes.

25 Q. And what's the attachment?

1 **A.** Royal Mail.doc.zip.

2 **Q.** Is there any text in the body of the e-mail?

3 **A.** There's not.

4 **Q.** Can we look at the attachment, please. Can you tell us
5 who this letter is addressed to?

6 **A.** It's addressed to Mr. Graham Dixon, Analytics limited.

7 **Q.** And who is it from?

8 **A.** Mark Hansen.

9 **Q.** And he's senior vice president and head of compliance at
10 State Street Global Market? Is that what that says?

11 **A.** Yes.

12 **Q.** Could you read the text of the letter, please?

13 **A.** "Dear Mr. Dixon, I refer to the analysis you are
14 currently conducting on behalf of our mutual client, the
15 Royal Mail Pension Trustees Limited.

16 "As requested by our transition management team, we
17 have reviewed the bond trading activity as well as the
18 commission rebate relating to the global credit transition
19 executed for this client in March/April 2011.

20 "Following the review, I can confirm that the
21 compensation amount of \$1,010,003.67 for all TRACE and
22 nonTRACE eligible bonds is consistent with our internal
23 analysis.

24 "I trust this information is helpful for your
25 analysis."

1 **Q.** Thank you. Could we look at Exhibit 189, please. This
2 is a multipage chain. If we could start on the fourth page,
3 please, at the bottom.

4 Who is this from?

5 **A.** Marshall Bailey.

6 **Q.** Who is it to?

7 **A.** Ross McLellan.

8 **Q.** Can you tell us the date?

9 **A.** August 25, 2011.

10 **Q.** That's a Thursday?

11 **A.** Correct.

12 **Q.** Can you tell us the subject line?

13 **A.** "Ross, I need to speak with you urgently, please. Please
14 call my mobile below."

15 **Q.** And is there any text below?

16 **A.** No.

17 **Q.** Can we look at the response? This is from McLellan?

18 **A.** Yes.

19 **Q.** What does it say?

20 **A.** "No mobile below."

21 **Q.** Can we look at the response? What is that word?

22 **A.** "Sorry."

23 **Q.** And does there appear to be a phone number beneath it?

24 **A.** Yes.

25 **Q.** If we can look at the response? Is that from Mr.

1 McLellan to Mr. Bailey?

2 **A.** It is.

3 **Q.** What does he say?

4 **A.** "Let's chat in the a.m., could barely hear you. I'm
5 aware and believe it is in control."

6 **Q.** Thank you. Could we look at the response? Who is this
7 from?

8 **A.** Marshall Bailey.

9 **Q.** Who is it to?

10 **A.** Ross McLellan.

11 **Q.** And the date?

12 **A.** August 25, 2011.

13 **Q.** Could you read the text?

14 **A.** "I have just found a place to pull over on the highway,
15 apols for the bad line. Glad you are aware of it and glad
16 you feel it is under control. My concern is that we are
17 operating in a manner consistent with the FSA and other
18 requirements. It sounds serious, but I have very few facts
19 at this point."

20 **Q.** Could we look at the response from McLellan?

21 **A.** Yes.

22 **Q.** Date?

23 **A.** August 25, 2011.

24 **Q.** What does he say?

25 **A.** "We are fine with respect to contract and FSA. Client

1 perception and consultant perception is issue."

2 **Q.** Could we look at the response? This is back from
3 Mr. Bailey?

4 **A.** Yes.

5 **Q.** Can you tell us the date of this e-mail?

6 **A.** August 26, 2011.

7 **Q.** That's Friday?

8 **A.** Correct.

9 **Q.** Can you read the response, please?

10 **A.** "Ross, how much do we know about the FSA rules here? Can
11 you let me know what advice you have sought on our
12 obligations to our client and what risks we might be running?
13 Can you point me to the people that have advised you on the
14 FSA and UK/Europe regulation, and what steps have been taken
15 to ensure your comfort that we are fine with respect to
16 contract and FSA is, in fact, the case.

17 "I am not convinced that we have done enough work
18 on this and ask that we urgently find out our obligations and
19 risks. If you can help by linking me into the discussions
20 that you've had internally, I will follow-up. Who in legal
21 and compliance has been consulted?"

22 **Q.** Can you look at the response, please? How does McLellan
23 respond?

24 **A.** "Will call you this morning."

25 **Q.** Thank you. Can you look at Exhibit 190, please. Who is

1 this from?

2 **A.** Ross McLellan.

3 **Q.** Who is it to?

4 **A.** David Puth.

5 **Q.** If you read the -- and the date, please?

6 **A.** Friday, August 26, 2011.

7 **Q.** Can you read the text of the e-mail?

8 **A.** "David, wanted to bring you up to speed on a client issue
9 we have in the UK. We performed a US bond and European bond
10 transaction for this client in March. We took a basis point
11 of yield on these transactions, which is our customary charge
12 for bond transactions. The issue is that this was not
13 disclosed to the client and they also paid us a management
14 fee for the transaction.

15 "Compliance is looking into whether you can charge
16 a management fee and a spread. The initial read is that this
17 is fine if disclosed properly. The reason this has come to
18 light is the client is asking us to certify all remuneration
19 to State Street and affiliates as part of the transaction.
20 Should we not get 100 percent comfortable with how we process
21 this, we will rebate the spreads back to the client. Mark
22 Hansen is looking into this and Marsh and Steve are aware, as
23 well. Nothing for you to do at this point, rather, I am
24 simply making you aware."

25 **MR. FRANK:** Thank you, no further questions.

1 THE COURT: Any cross-examination, Mr. Weinberg?

2 MR. WEINBERG: Yes, Your Honor, just about five
3 minutes, if I can.

4 THE COURT: Yes.

5 **CROSS-EXAMINATION BY COUNSEL FOR DEFENDANT**

6 BY MR. WEINBERG:

7 Q. Good morning.

8 A. Good morning.

9 Q. I'm going to show you one page of one of the exhibits
10 that Mr. Frank introduced in evidence and had you read.

11 MR. WEINBERG: Can I have 99.1, please. Could we
12 blow it up?

13 BY MR. WEINBERG:

14 Q. And I appreciate you're not the case agent and you -- if
15 I understand your direct testimony, did a limited amount of
16 work on this case; is that correct?

17 A. That is correct.

18 Q. You understand, however, do you not, that the NTMA
19 transition that is the subject of several of the exhibits
20 that Mr. Frank had you introduce in evidence was a transition
21 of a client from Ireland, correct?

22 MR. FRANK: Objection. Beyond the scope.

23 THE COURT: Well, no. This exhibit came in.
24 Overruled.

25 MR. FRANK: The witness simply introduced the

1 exhibit, Your Honor. That's my objection.

2 THE COURT: You're asking him what he knows or to
3 read this?

4 MR. WEINBERG: I'm going to focus him on one of the
5 exhibits and have him read certain things into evidence.

6 THE COURT: Overruled.

7 MR. WEINBERG: Just like Mr. Frank did.

8 MR. FRANK: If that's the case. We have no
9 objection, Your Honor.

10 THE COURT: You can answer the question, if you
11 know.

12 BY MR. WEINBERG:

13 Q. Is this one of the pages of one of the exhibits that the
14 Government prosecutor had you introduce to this jury?

15 A. Yes, it is.

16 Q. And is this list in the top portion of the exhibit the
17 name of the client?

18 A. It does.

19 Q. The National Treasury Management Services, NTMA?

20 A. Correct.

21 Q. And does it state where they're domiciled in Ireland,
22 correct?

23 A. It is indicated.

24 Q. And does it reflect that this is a kind of general,
25 introductory sheet, that says that the clients of State

1 Street could be in any one of these countries?

2 MR. FRANK: Objection. Foundation.

3 THE COURT: Overruled.

4 THE WITNESS: There are many boxes showing many
5 different countries on the sheet.

6 BY MR. WEINBERG:

7 Q. And this is as -- this sheet is a State Street business
8 record to your understanding?

9 MR. FRANK: Objection.

10 THE WITNESS: That is my understanding.

11 BY MR. WEINBERG:

12 Q. Thanks. Could we go down to the next -- listed here is a
13 number of different State Street entities, correct?

14 A. Correct.

15 Q. In other words, it demonstrates that the contract in this
16 case was State Street Bank Europe, rather than any of the
17 other State Street entities, correct?

18 A. That's what's indicated, yes.

19 Q. Could we go down to the bottom, please. And again here,
20 there's a subject for governing law, listing a number of
21 countries and a number of states that could be the legal site
22 of a contract, correct?

23 A. That is what the form shows.

24 Q. And here at the contract is the governing law for this
25 particular transaction is Ireland, correct?

1 **A.** Yes, that's what's indicated.

2 **Q.** Not Great Britain and certainly not any of the states of
3 the United States are checked off here, correct?

4 **A.** Only Ireland is checked.

5 **Q.** Now, if we can switch to Exhibit 159. And if we can go
6 to the second page and highlight the name of the individual
7 that's corresponding with Mr. McLellan in this exhibit.

8 BY MR. WEINBERG:

9 **Q.** Do you see that the e-mail originates with a Dan
10 Falkowski who is an investment associate at the City of
11 Philadelphia Board of Pensions and Retirement?

12 **A.** Yes.

13 **Q.** And he's asking about a document he received from State
14 Street and Mr. McLellan is providing an answer, correct?

15 **A.** Yes.

16 **Q.** And Philadelphia is a City in Pennsylvania in the United
17 States, and we can assume, can we not, that the governing
18 law, if there's a transition involving the City of
19 Philadelphia Pension Fund would be a US law and perhaps a
20 Philadelphia law, correct?

21 **A.** That would be my guess.

22 **Q.** And this is -- he's writing on behalf of a US city
23 pension fund, correct?

24 **A.** Yes.

25 **Q.** Asking questions of Mr. McLellan about a US -- a

1 potential US transition for a US pension fund that's a city
2 pension fund, correct?

3 **A.** Correct.

4 **Q.** And are you aware of the fact that certain US pension
5 funds have special protections under US law, a law called
6 ERISA?

7 MR. FRANK: Objection. Beyond the scope.

8 THE COURT: Sustained.

9 BY MR. WEINBERG:

10 **Q.** Are you aware, if you are, that the laws in Philadelphia
11 and the United States are different than the laws in Ireland
12 and Great Britain?

13 MR. FRANK: Objection. Beyond the scope.

14 THE COURT: Overruled.

15 THE WITNESS: I'm aware of differences in the law,
16 generally.

17 BY MR. WEINBERG:

18 **Q.** Okay. Not specifically, but generally?

19 **A.** No, not in any particular specific.

20 **Q.** But you do know, from the exhibit beforehand, that that
21 sheet shows the subject governing law and then has a series
22 of countries and a series of states that would, when checked
23 off, be the separate, distinct governing law that controlled
24 a contract between a party and State Street as to a specific
25 transition, correct?

1 MR. FRANK: Objection as to what it shows, Your
2 Honor.

3 THE COURT: Sustained as to the form of the
4 question.

5 BY MR. WEINBERG:

6 Q. 99-1, shown to you before, has a list of states and
7 countries that have the title "governing law," correct?

8 A. Yes.

9 Q. And the governing law of the United States is distinct
10 from the governing law that had NTMA and State Street Bank
11 Europe as their contracting parties, correct?

12 A. The form suggests that.

13 MR. WEINBERG: Thank you.

14 THE COURT: Any redirect?

15 MR. FRANK: No questions, Your Honor.

16 THE COURT: Thank you very much, sir, you're
17 excused.

18 Next witness.

19 MR. JOHNSTON: Your Honor, the Government calls
20 Scott Shaw to the stand.

21 MR. FRANK: Your Honor, we would also offer into
22 evidence, while we're waiting for the witness, Exhibit 213,
23 which is simply a list of the exhibit numbers for the audio
24 that we've previously introduced. It's been entered into
25 evidence, as well as the dates of those calls, which I

1 understand are not objected to.

2 MR. WEINBERG: No objection.

3 THE COURT: So Exhibit 213 is itself -- it's a
4 summary in a sense, by listing the audio recordings and the
5 date of the audio recordings?

6 MR. FRANK: That's correct, Your Honor.

7 THE COURT: All right. That's admitted.

8 (Exhibit No. 213 admitted into evidence.)

9 THE COURT: You'll have that with you in the jury
10 room and that will be helpful to you, I think, ladies and
11 gentlemen.

12 **SCOTT K. SHAW**

13 having been duly sworn, testified as follows:

14 **DIRECT EXAMINATION BY COUNSEL FOR PLAINTIFF**

15 BY MR. JOHNSTON:

16 **Q.** Good morning, Mr. Shaw.

17 **A.** Good morning.

18 **Q.** Where do you live?

19 **A.** I live in Boston, Massachusetts.

20 THE COURT: Just for the record, have him state his
21 name.

22 MR. JOHNSTON: Sure.

23 THE WITNESS: Scott Kevin Shaw.

24 THE COURT: Go head.

25 BY MR. JOHNSTON:

1 Q. Where do you live, Mr. Shaw?

2 A. Boston, Massachusetts.

3 Q. How old are you?

4 A. 57.

5 Q. Where do you work?

6 A. I work at State Street Bank and Trust.

7 Q. What is your job there?

8 A. I'm the chief compliance officer for our global markets,
9 global exchange, and global treasury operations.

10 Q. So that includes the entity called State Street Global
11 Markets?

12 A. Yes. The broker-dealer compliance officer reports to me
13 and to the president of the broker-dealer.

14 Q. How long have you worked at State Street?

15 A. About two-and-a-half years now.

16 Q. Where did you work before that?

17 A. I've been in the industry 36 years, mostly in the
18 compliance field. I was at Bank of New York Mellon for ten
19 years prior to State Street, covering treasury broker-dealer
20 services, their global markets. At the time, they had 21
21 broker-dealers when I joined them, I was in projects to
22 consolidate some of those operations. Prior to that, I was
23 the chief compliance officer at Bear Stearns and a number of
24 other companies over my career.

25 Q. Do you have any professional qualifications related to

1 your job?

2 **A.** Quite a few. Aside from sitting on many industry
3 associations, including one of the authors of the white paper
4 on the role of compliance back in 2005, I do have a number of
5 broker-dealer licenses, based on my role as a chief
6 compliance officer in the industry for many years. I have
7 the Series 7, Series 24, 63, 14, 15.

8 **Q.** What are some of the duties that you have as a chief
9 compliance officer of State Street Global Markets?

10 **A.** State Street structures compliance around something
11 called a compliance oversight program --

12 MR. WEINBERG: Excuse me, Mr. Shaw.

13 I object, unless it's related to the limited
14 subjected matter that I understand this witness is being
15 offered for.

16 MR. JOHNSTON: Your Honor, we need to lay some of
17 the foundation of his background and duties so he has a
18 foundation for eliciting what he's going to be testifying
19 about.

20 THE COURT: Is it going to be relating to what he's
21 testifying about?

22 MR. JOHNSTON: Yes. He's going to be testifying
23 about how he knows certain things about how bonds are traded.

24 THE COURT: Very briefly, with respect to the -- I
25 don't think you're called to testify about the compliance

1 program that State Street does or doesn't have. But just
2 very briefly.

3 THE WITNESS: So in a nutshell, and including the
4 compliance director at the specific broker-dealer, who I
5 mentioned before that reports to me, and the president of
6 that broker-dealer, has a duty to stay abreast of
7 regulations, make sure there's a training program, that there
8 are communications to management and others with regard to
9 the changing of regulations; overseeing a surveillance
10 program to monitor the activities within the broker-dealer,
11 to ensure that there are tools and there's a review that
12 managers and supervisors who are licensed to oversee the
13 activities within broker-dealer.

14 Q. Mr. Shaw, in your experience, or 30 years of experience
15 as a compliance officer, have you gained knowledge about the
16 operations side of a broker-dealer?

17 A. Yes.

18 Q. Does that include knowledge about how over-the-counter
19 securities are settled and cleared?

20 A. Yes.

21 Q. What is the basis of your knowledge?

22 A. Well, aside from just being a head of compliance for many
23 years, at Bank of New York, we owned a company called
24 Pershing. Pershing was the largest securities clearing firm
25 in the world, with over 1,000 broker-dealers. We were also

1 one of the largest government securities clearing firms in
2 the world, to the tune of about \$8 trillion a day in
3 government securities clearance.

4 **Q.** Can you tell us what clearing and settlement is, as it
5 pertains to US bonds?

6 **A.** Sure. It's actually -- most people don't realize it's
7 quite complicated and heavily regulated --

8 THE COURT: Not what people realize, just answer
9 what is --

10 THE WITNESS: Okay. In a transaction, a client,
11 someone wants to buy a bond, someone wants to sell a bond,
12 goes through a broker-dealer, they meet on a price in the
13 back-office side of the operation. Most of the major firms
14 are members of something called the National Securities
15 Clearing Corp., NSCC. The parent entity is the Depository
16 Trust Clearing Corporation. The securities markets break
17 down to DTC, the NSCC, which I just mentioned, and FICC.
18 FICC handles mostly government securities. DTC is the
19 central of securities processing entity. NSCC is a CCP.

20 So what happens is everything is -- I believe
21 people spoke about TRACE, from what I understand. But the
22 broker-dealers have an obligation to report activity to a
23 public marketplace, so that there is access for regulators to
24 monitor the transaction itself. On the back-end side is
25 where all of these other activities take place.

1 So what you'll see is that the company will flow
2 its information up into NSCC, which we are a member of, as
3 almost every major --

4 BY MR. JOHNSTON:

5 **Q.** When you say "we are a member," you're talking about
6 State Street Global Markets?

7 **A.** That's right.

8 **Q.** Do you have an understanding of whether State Street
9 Global Markets was a member of the NSCC in 2010/2011?

10 **A.** I believe they were.

11 **Q.** And why is it important for broker-dealers to be members
12 of the NSCC?

13 **A.** Post the market collapse in 2007, the initiation of the
14 regulations known as Dodd-Frank, there's a push towards
15 central clearing. Almost every major firm, over a thousand
16 firms or members --

17 MR. WEINBERG: Excuse me, Mr. Shaw. The only thing
18 relevant is 2010 and 2011. I think Dodd-Frank came after. I
19 object.

20 MR. JOHNSTON: Dodd-Frank was 2009, but that's
21 fine.

22 THE COURT: Neither of you are testifying as to
23 when Dodd-Frank was or wasn't passed, what it is, or
24 either -- if it has relevance to this case, it will come from
25 the witnesses. So the jury should disregard the references

1 by both counsel to Dodd-Frank.

2 I think the witness should just stay focused on
3 your questions about what is clearing and settlement, without
4 regard to sort of larger industry --

5 THE WITNESS: How the market operates?

6 THE COURT: Yeah.

7 MR. JOHNSTON:

8 **Q.** If we could just maybe break it down for the jury. What
9 happens when a bond clears and settles?

10 **A.** Sure. I was trying to get there.

11 Clearance is the process whereby the records are
12 maintained. The eventual transfer of records to multiple
13 entities to maintain accuracy, slightly similar to eBay, if
14 anyone's ever used eBay, flow of information, it is all done
15 electronically today. Settlement, which used to be T plus
16 five, then to T-3, and as of last October is now trade date
17 plus two, is when the actual money moves from the buyer,
18 through to the seller, and the securities go from the seller
19 to the buyer.

20 **Q.** Does that happen at the same time, the money exchange,
21 and then the bond exchange?

22 **A.** That's right.

23 **Q.** And where does that exchange happen for US corporate
24 bonds?

25 **A.** It goes --

1 THE COURT: 2010 to 2011. Not 2018, not 2009.

2 THE WITNESS: The push towards electronic --

3 THE COURT: Just when did it happen in 2010 to
4 2011, is what he's asking you.

5 MR. WEINBERG: NSCC was probably electronic in 2010
6 and 2011.

7 BY MR. JOHNSTON:

8 **Q.** And where was the NSCC located in 2010/2011?

9 **A.** DTCC, which is the parent over these entities, is based
10 in New York. DTC is regulated by the New York State banking
11 authorities, the SEC and the fed.

12 **Q.** That's okay. We don't need to go into where they are
13 regulated.

14 **A.** Okay.

15 **Q.** So when you say that a bond clears and settles at the
16 NECC, in the 2010/2011 time period, who maintains the record
17 of this -- or who coordinates this transfer of the money and
18 the ownership record?

19 **A.** So to try and keep it simple, the exchanges and the
20 brokers are members of NSCC. They have -- so if you were to
21 kind of draw a chart, you have DTC, which is a central
22 clearing -- which is a central security repository, where the
23 records are maintained. You have the NSCC, which matches and
24 handles the flow of information, such that there is accuracy.
25 It's all done electronically. And then you have the brokers

1 who communicate with their clients. And then the clients
2 direct their custodians to move the money.

3 **Q.** So who are members of the DTC?

4 **A.** All -- there are over 1,000 broker-dealers and exchanges.
5 Most of the exchanges. So these are central clearing parties
6 under --

7 **Q.** So when -- in 2010/2011, when a bond, a US corporate bond
8 was either bought or sold by State Street Global Markets,
9 where would -- how would State Street Global Markets ensure
10 that the -- it was transferred to the other party?

11 **A.** It was sent to the back office settlement process.

12 **Q.** And who coordinates the settlement process?

13 **A.** Well --

14 **Q.** Which entity?

15 **A.** Operations at the broker-dealer would flow the
16 information up electronically.

17 **Q.** To which entity?

18 **A.** To the NSCC.

19 **Q.** I want to show you a document that's already been
20 admitted into evidence, Exhibit 148.1, page 15 --

21 Or actually, before we go there, I'm showing you a
22 post-trade report.

23 Is your monitor visible?

24 **A.** I guess. For Royal Mail it says?

25 **Q.** Yes. This is a post-trade report, fixed income. If we

1 can look at page is 15. And if we can zoom in on several of
2 the trades in the middle.

3 **A.** This is a terrible screen, by the way.

4 THE WITNESS: Thank you. He blew it up, because
5 otherwise you can't see it.

6 THE DEPUTY CLERK: Okay.

7 BY MR. JOHNSTON:

8 **Q.** Mr. Shaw, I'm showing you trade information. And you can
9 see there's dates in the right-hand columns for March 22,
10 2011, March 25, 2011.

11 **A.** Yes.

12 **Q.** Looking at these bond trades, can you determine whether
13 these were settled and cleared in the United States?

14 **A.** These are US bonds. I know, based upon the left side,
15 these are ISIN numbers, which is an international agreement
16 among countries. The United States mostly uses something
17 called a CUSIP, but globally they use an ISIN. The first two
18 letters of an ISIN is the country of origin of the bond or
19 the securities. So US makes it pretty clear that these are
20 US securities.

21 **Q.** And at the time, in 2011, where did bonds like these US
22 corporate bonds clear and settle?

23 **A.** Through the NSCC.

24 **Q.** And where is the NSCC located?

25 **A.** New York.

1 Q. One final question. Where do US -- US stocks trade?

2 A. Mostly in the United States, but there are markets that
3 exist in the over-the-counter, where you probably could do a
4 transaction somewhere else.

5 Q. So where are US stocks --

6 A. Mostly in the United States.

7 Q. What exchanges?

8 A. The New York Stock Exchange, back then. There were other
9 regional exchanges, and most large broker-dealers make
10 markets in these securities.

11 Q. And in 2010/2011, where were, to your knowledge, all US
12 corporate bonds cleared and settled that were bought and
13 sold?

14 A. Virtually almost all over the United States.

15 MR. JOHNSTON: Thank you. No further questions.

16 THE COURT: Cross-examination, Mr. Goldstein?

17 MR. GOLDSTEIN: Thank you, Your Honor.

18 May we have the ELMO, please.

19 **CROSS-EXAMINATION BY COUNSEL FOR DEFENDANT**

20 BY MR. GOLDSTEIN:

21 Q. Good morning, Mr. Shaw.

22 A. Good morning.

23 Q. You testified -- well, strike that.

24 You were testifying regarding the time period
25 of 2010/2011, correct, regarding some aspects of your

1 testimony?

2 **A.** Yes.

3 **Q.** And I'm correct in concluding that you were not with
4 State Street at that relevant time, right?

5 **A.** No, I was not.

6 **Q.** You have no personal knowledge regarding how their
7 backroom operations actually worked in 2009, 2010, or 2011,
8 correct?

9 **A.** Well, I had some questions and asked a few people within
10 the organization in preparing for --

11 **Q.** Excuse me. I'm asking about your personal knowledge.

12 **A.** My personal knowledge is only based on what people told
13 me.

14 **Q.** Right. So you have no firsthand personal knowledge,
15 right?

16 **A.** I was not there.

17 **Q.** So you can't testify, from your own personal knowledge,
18 in terms of how State Street's back-office operations worked
19 in 2009, 2010, or 2011, correct?

20 **A.** Not firsthand personal knowledge, only relying on
21 material that's been presented to me.

22 MR. GOLDSTEIN: Your Honor, I move to strike the --

23 THE COURT: The latter part is struck.

24 MR. GOLDSTEIN: And I would ask if you would just
25 instruct the witness to answer the question.

1 THE COURT: Yes. Just the question.

2 BY MR. GOLDSTEIN:

3 Q. So for the third time --

4 MR. FRANK: Objection.

5 THE COURT: Overruled.

6 BY MR. GOLDSTEIN:

7 Q. No firsthand knowledge regarding how State Street's
8 back-office operations worked in 2009, 2010, or 2011,
9 correct?

10 A. Correct.

11 Q. Thank you. And you testified regarding that now that
12 you're at State Street, the head of the broker-dealer
13 apparently reports to you; is that correct?

14 A. The chief compliance officer reports to me, and as I
15 stated before, to the president of the broker-dealer.

16 Q. My point is that State Street has an independent
17 broker-dealer, correct?

18 A. It does.

19 Q. And it's a corporate entity called SSGM, LLC, right?

20 A. Correct.

21 Q. Shorthand for State Street Global Markets, LLC, correct?

22 A. Correct.

23 Q. Different corporate entity than State Street Bank and
24 Trust, correct?

25 A. Correct.

1 **Q.** Now, when -- State Street has other corporate entities
2 besides State Street Global Trust, right? State Street Bank
3 and Trust, correct?

4 **A.** Yes.

5 **Q.** And one of those is State Street Bank Europe Limited,
6 correct?

7 **A.** I believe so.

8 **Q.** And when -- State Street Global Markets does execute
9 trades on behalf of State Street Bank Europe Limited,
10 correct?

11 **A.** I assume so, yes.

12 MR. GOLDSTEIN: Right. Your Honor, I'd like to
13 show the witness what's been marked as Exhibit B.

14 THE COURT: This is for identification?

15 MR. GOLDSTEIN: Yes.

16 THE WITNESS: Can you shrink this?

17 MR. GOLDSTEIN: Sure.

18 THE WITNESS: Keep going. It looks like there's
19 things off to the right that I can't see.

20 MR. GOLDSTEIN: That's just someone's initials,
21 Mr. Shaw.

22 THE WITNESS: Okay. Yes.

23 BY MR. GOLDSTEIN:

24 **Q.** Now, State Street Bank Europe Limited, you're aware they
25 can contract with clients in Europe for transition management

1 services, correct?

2 MR. JOHNSTON: Objection, Your Honor. Beyond the
3 scope.

4 THE COURT: Sustained.

5 BY MR. GOLDSTEIN:

6 Q. State Street Global Markets executes trades on behalf of
7 State Street Bank Europe Limited, correct?

8 A. According to what I'm seeing here, it looks that way.

9 Q. Well, no. I'm asking you. You just testified a few
10 moments ago that you understand that State Street Global
11 Markets is a broker-dealer for the bank, right?

12 A. Yes.

13 Q. And it performs execution services for other corporate
14 subsidiaries of the bank, like State Street Bank Europe
15 Limited, correct?

16 A. Yes.

17 Q. And when a broker-dealer executes a trade, meaning when
18 SSGM, LLC, executes a trade, they go to the marketplace --

19 A. That's right.

20 Q. -- to find a counterparty for that particular trade,
21 right?

22 A. Correct.

23 Q. And after locating a specific counterparty, that's sort
24 of the process that you were testifying about in terms of
25 clearing and settlement, right?

1 **A.** No. That's execution. Clearing and settlement takes
2 place after the execution.

3 **Q.** Right. Meaning after the trade is executed, there needs
4 to be settlement and clearance, right?

5 **A.** Yes.

6 **Q.** And that's when title to whatever was bought and sold is
7 transferred from one party to the next, right?

8 **A.** It's a little more complicated with regard to title under
9 the way the market is structured. We can have a very lengthy
10 conversation about that.

11 **Q.** That's way above my pay grade, Mr. Shaw.

12 **A.** So we can just say transfer of ownership or beneficial
13 ownership.

14 **Q.** So in a fixed income execution, the broker-dealer goes to
15 the marketplace, and eventually the fixed income instrument,
16 if they're buying it, would go from a counterparty to the
17 broker-dealer, meaning SSGM, LLC, correct?

18 **A.** There would be a trade report, yes.

19 **Q.** Right. And does title and ownership of that fixed income
20 go from the counterparty to SSGM, LLC?

21 **A.** Change of beneficial ownership, not title.

22 **Q.** Okay. And so change of beneficial ownership goes to the
23 broker-dealer, correct?

24 **A.** It goes to the end customer who bought the bonds.

25 **Q.** Eventually, right?

1 **A.** Yes. The broker-dealer never owns the bonds, unless
2 they're buying for themselves.

3 **Q.** And if State Street Global Markets is executing a
4 particular order for State Street Bank Europe Limited, as you
5 see here in this exhibit, SSGM's client is SSBEL; is that
6 correct? Meaning when SSBEL orders execution, the
7 broker-dealer's client is the SSBEL.

8 **A.** What does "E-L" stand for?

9 **Q.** State Street Bank Europe Limited.

10 **A.** Yes, then.

11 **Q.** So that's correct, right?

12 **A.** If that's how the order is given, yes.

13 MR. GOLDSTEIN: Thank you.

14 Nothing further, Your Honor.

15 THE COURT: Redirect?

16 MR. JOHNSTON: Briefly.

17 **REDIRECT EXAMINATION BY COUNSEL FOR PLAINTIFF**

18 BY MR. JOHNSTON:

19 **Q.** Mr. Shaw, do you have personal knowledge of where all US
20 corporate bonds were settled and cleared in 2010 and 2011?

21 **A.** I'm pretty confident that it's through NSCC and DTC.
22 They've been around a long time.

23 **Q.** And why are you confident that that's where all US bonds
24 were settled and cleared in 2010 and 2011?

25 **A.** The settlement process is either bilateral or centrally

1 cleared. Bilateral is where it would be done away from DTC,
2 NSCC, these central clearing counterparties. The efficiency
3 of the market has evolved over many, many years where, from a
4 risk standpoint and efficiency in the marketplace, tools that
5 are provided to the industry from these entities over time.
6 Virtually all bonds and securities flow through central
7 clearing.

8 **Q.** And prior to testifying today, did you review business
9 records of State Street?

10 **A.** Yes.

11 **Q.** Did you look at the trade records for the transitions of
12 Royal Mail, NTMA, KIA, Sainsbury's?

13 **A.** Yes.

14 **Q.** Did you review those?

15 MR. GOLDSTEIN: I object, Your Honor, in terms
16 of -- I don't know what records we're referencing, whether
17 they've been admitted or not.

18 THE COURT: Sustained. It's beyond the scope.

19 MR. JOHNSTON: He challenged the basis of his
20 knowledge of where these records were, where these trades --

21 THE COURT: Not as to specific transactions.

22 BY MR. JOHNSTON:

23 **Q.** Did you review trade confirmations prior to coming into
24 court today?

25 **A.** I reviewed a sample, yes.

1 Q. We can go and review Exhibit 399, which has been already
2 admitted into evidence.

3 MR. GOLDSTEIN: Beyond the scope, Your Honor.

4 THE COURT: Sustained.

5 BY MR. JOHNSTON:

6 Q. Where did -- in Exhibit 399, which you reviewed, where
7 did those bonds settle and clear?

8 MR. GOLDSTEIN: Objection, Your Honor.

9 THE COURT: Sustained.

10 BY MR. JOHNSTON:

11 Q. Where do US bonds settle and clear in 2010/2011?

12 MR. GOLDSTEIN: Objection.

13 THE COURT: Overruled.

14 THE WITNESS: Mostly through the NSCC and DTC.

15 MR. JOHNSTON: Thank you.

16 THE COURT: Any recross?

17 MR. GOLDSTEIN: No.

18 THE COURT: You're excused, sir. Thank you very
19 much.

20 Next witness.

21 MR. FRANK: Thank you, Your Honor, the Government
22 calls Michael McGillicuddy.

23 THE COURT: Can I see counsel for one second at
24 sidebar?

25 (The following discussion held at the bench.)

1 THE COURT: I just want to clarify, with this
2 witness, I'm unclear as to what -- this is the FBI agent,
3 right? Did you want me to say something about him not being
4 there related to this case, or is that just going to come out
5 in the direct?

6 MR. FRANK: It's going to come out in the first
7 questions for direct.

8 THE COURT: So you're not asking me for an
9 instruction?

10 MR. WEINBERG: No, not at this point, but if it's
11 the all unclear, I'll ask again.

12 THE COURT: Right and I just -- the reason to have
13 you at sidebar is what you want me to say or not to say.
14 That's fine.

15 (Bench conference concluded.)

16 THE COURT: Please be seated.

17 Go ahead, Mr. Frank.

18 MR. FRANK: Thank you, Your Honor.

19 **SPECIAL AGENT MICHAEL MCGILLICUDDY**

20 having been duly sworn, testified as follows:

21 **DIRECT EXAMINATION BY COUNSEL FOR PLAINTIFF**

22 BY MR. FRANK:

23 **Q.** Could you tell us your name and spell it for the record,
24 please?

25 **A.** Yes. It's Michael McGillicuddy, M-i-c-h-a-e-l, last name

1 spelled M-c, capital G, i-l-l-i-c-u-d-d-y.

2 **Q.** Where do you work?

3 **A.** I work for the FBI's Washington field office.

4 **Q.** And how long have you worked at the FBI?

5 **A.** About 12 and a half years.

6 **Q.** And during most of that time, what squad have you been
7 assigned to?

8 **A.** Most of the time, I've been on a securities fraud squad
9 in our criminal division.

10 **Q.** Have you had any involvement in the investigation of the
11 defendant in this case?

12 **A.** I have not, no.

13 **Q.** Or of State Street's transition management business?

14 **A.** No.

15 **Q.** Did there come a time when you were involved in an
16 investigation of an entity called ConvergEx?

17 **A.** Yes, that was one of my investigations.

18 **Q.** What is ConvergEx?

19 **A.** It's a large broker-dealer based in New York.

20 **Q.** As part of your investigation, did there come a time when
21 you interviewed the defendant in this case, Ross McLellan?

22 **A.** Yes, I interviewed Mr. McLellan in January of 2012.

23 **Q.** Why did you interview Mr. McLellan?

24 **A.** We had obtained some information that State Street was a
25 significant client of ConvergEx's and Mr. McLellan's name was

1 given to us as the point of contact for order flow coming
2 from State Street. So we wanted to talk to him as a witness,
3 both as a client, and maybe even a potential victim.

4 **Q.** Where did you interview him?

5 **A.** At his residence.

6 **Q.** And why did you go to his house?

7 **A.** At the time, our information was that he no longer worked
8 at State Street and given that we did not know where he was
9 employed, the obvious choice was to catch up with him at his
10 home.

11 **Q.** Was your visit announced or unannounced?

12 **A.** It was unannounced.

13 **Q.** Why is that?

14 **A.** It's what we call a knock-and-talk interview. We were
15 just looking to catch up with a possible victim at the most
16 convenient place for them.

17 **Q.** What was Mr. McLellan's demeanor when you spoke with him?

18 **A.** Cooperative.

19 **Q.** He invited you into his home?

20 **A.** He did.

21 **Q.** As part of the interview, did there come a time when you
22 spoke to him about a spreadsheet relating to ConvergeEx?

23 **A.** Yes.

24 **Q.** Tell us about that.

25 **A.** He said that he had received an anonymous fax --

1 anonymous being my words -- a fax that looked to be an
2 internal ConvergeX document, which was a spreadsheet that
3 outlined the amount of spread that ConvergeX had taken on its
4 clients trades over some period of time.

5 **Q.** What, if anything, did he tell you about who he thought
6 sent the spreadsheet to him?

7 **A.** He didn't know. He -- he believed it to be from a
8 disgruntled former ConvergeX employee that was looking to out
9 the practice of ConvergeX taking a spread on client trades.

10 **Q.** Did Mr. McLellan say anything to you about State Street's
11 own business practices during that interview?

12 **A.** Yes.

13 **Q.** When you spoke to him, were you speaking about the
14 transition business specifically, or more generally?

15 **A.** More generally.

16 **Q.** Why is that?

17 **A.** Just order flow that came into ConvergeX.

18 **Q.** Okay. What, if anything, did he tell you in that
19 conversation about how State Street chooses third-party
20 brokers?

21 MR. GOLDSTEIN: Well, Your Honor, I object given --
22 could we be heard at sidebar, please, rather than --

23 THE COURT: All right.

24 (The following discussion held at the bench.)

25 MR. GOLDSTEIN: I'm not exactly sure where Mr.

1 Frank is going. You're just asking whether the questions
2 related to transition management in general, specifically or
3 some in general?

4 THE COURT: I thought he said that his question
5 talked generally about State Street, but not specifically
6 about business management.

7 MR. FRANK: And what I can elicit, if counsel is
8 concerned about it, is that Mr. McLellan described in his
9 biography, said that he had transition business. The
10 questions were not -- he didn't phrase each question with
11 respect to in transition management, he just asked a
12 general -- general understanding, what he was talking about
13 in his business.

14 MR. GOLDSTEIN: Well, the problem, Your Honor, was
15 that will -- given the statements given, it's not even in the
16 specific context of transition management business.
17 Mr. McLellan is making broad-based statements about State
18 Street's business practices, which is not even confined to
19 this trial. It's more misleading.

20 MR. FRANK: That's incorrect, Your Honor. The
21 witness will testify that --

22 THE COURT: It's overruled. I think that goes at
23 the moment to the weight.

24 (Bench conference concluded.)

25 BY MR. FRANK:

1 **Q.** What, if anything, did he tell you about how State Street
2 chooses third-party brokers?

3 **A.** He said they routed order flow to several brokers and
4 that it shows their brokers based on their ability to provide
5 best execution, best price, and lowest commission rate.

6 **Q.** What, if anything, did he tell you about State Street's
7 practices with respect to taking commissions and fees?

8 **A.** That they fully disclosed their commission structure and
9 their fee structure to their clients.

10 **Q.** What, if anything, did he tell you about State Street's
11 practices with respect to taking undisclosed spreads?

12 **A.** That they did not take spreads on the types of trades
13 that they routed to ConvergeX.

14 **Q.** And what types of trades were those?

15 **A.** I'm not sure we asked him that. We were just talking
16 about order flow to ConvergeX generally, but I understood
17 that to be equities, because that was the subject matter of
18 our case.

19 **Q.** What, if anything, did he tell you about when he believed
20 it was permissible to take spreads?

21 **A.** He said he thought it was permissible, as long as the
22 spread was fully disclosed, and the client was not a
23 fiduciary.

24 MR. FRANK: Thank you, no further questions.

25 THE COURT: Cross-examination, Mr. Goldstein?

1 MR. GOLDSTEIN: Thank you, Your Honor.

2 **CROSS-EXAMINATION BY COUNSEL FOR DEFENDANT**

3 BY MR. GOLDSTEIN:

4 **Q.** Good morning, Agent McGillicuddy?

5 **A.** Good morning.

6 **Q.** You testified Mr. McLellan told you that -- well, strike
7 that. You spoke to Mr. McLellan about State Street's
8 practices back in the late 1990s and early 2000s, correct?

9 **A.** We spoke to him about State Street's practices over the
10 course of time leading up to the interview.

11 **Q.** He told you that State Street used ConvergEx in the 1990s
12 and early 2000s, correct?

13 **A.** He told us that that's when -- in his head, that's when
14 they sent them significant order flow.

15 **Q.** He told you that it stopped before 2008, correct?

16 **A.** He didn't say it stopped. He said significant. He said
17 the business level had dropped off.

18 **Q.** Okay. But you asked him about State Street's outsourcing
19 of when -- when it selected broker-dealers external to State
20 Street, right?

21 **A.** Yes.

22 **Q.** All right. And as you just testified, he told you that
23 there were multiple factors that State Street considered when
24 it was picking an outside broker-dealer, correct?

25 **A.** Correct.

1 **Q.** He also told you that back in that time period, State
2 Street didn't have broker-dealers in Europe or Asia, correct?

3 **A.** I don't think he said that. He did say he used ConvergeEx
4 for those regions.

5 **Q.** Okay. And he told you that when he selected a broker, or
6 when State Street was selecting an outside broker, they
7 looked to, in your words, best execution, best price, and
8 lowest commissions, correct?

9 **A.** Yes.

10 **Q.** That would mean, that, in Mr. McLellan's mind, when he
11 was speaking to you, best execution was not synonymous with
12 best prices, was it?

13 MR. FRANK: Objection to what was going on in Mr.
14 McLellan's mind.

15 THE COURT: Sustained as to Mr. McLellan's mind.
16 You can rephrase.

17 BY MR. GOLDSTEIN:

18 **Q.** When you asked him how he selected, he didn't simply say
19 best execution, right?

20 **A.** Right. He said best execution, best price, and lowest
21 commission rate.

22 **Q.** Right. So, therefore, best execution is not limited to
23 best price, according to the statement he gave you, correct?

24 MR. FRANK: Objection. Unless he's asking for the
25 witness's understanding.

1 THE COURT: Overruled.

2 BY MR. GOLDSTEIN:

3 Q. Correct?

4 A. I don't know how he defined the three and whether the
5 second two were mutually exclusive and a subset of the first.
6 He just listed the three.

7 Q. Right. Listed all three, right? Didn't simply list best
8 execution, right?

9 A. Correct.

10 Q. The interview took place in Mr. McLellan's home,
11 approximately 7 o'clock, correct?

12 A. That's right.

13 Q. Knock-and -- what did you call it? A knock-and what?

14 A. Knock-and-talk interview.

15 Q. Knock-and-talk interview. No advanced warning, right?

16 A. That's right.

17 Q. Mr. McLellan was inside his home with his wife, having a
18 glass of wine, in fact, correct?

19 A. I don't know remember if he was having a glass of wine.
20 His wife was at the residence, yes.

21 Q. Let you in, was cooperative, willing to speak to you,
22 right?

23 A. Yes.

24 Q. All right. And you testified that your conversation with
25 him was limited to equities, correct?

1 **A.** I think we were talking about order flow that State
2 Street sent to ConvergeEx. So I'm not sure we asked him to
3 define what that was, but --

4 **Q.** But you knew it to be equities, right?

5 **A.** I understood it to be equities, because that was the
6 focus of our case, but I don't know if we asked him about
7 that.

8 **Q.** And the conversation related to US-based clients of State
9 Street, correct?

10 **A.** We did not limit it to that, no.

11 **Q.** No. And did you ask Mr. McLellan any questions regarding
12 a transition for the NTMA, an Irish Government agency?

13 **A.** We did not.

14 **Q.** All right. So when you testified that Mr. McLellan made
15 statements about State Street's practices, you testified he
16 said fully disclosed commission and fee structure, right?

17 **A.** Correct.

18 **Q.** That was just some general question to him, or was that
19 specifically focused on State Street's transition management
20 business?

21 **A.** The way I remember it -- remember we were focused on the
22 ConvergeEx investigation. So we would have asked him how he
23 understood ConvergeEx was being compensated. But I think his
24 answer was by commission and then we would have asked him,
25 you know, were they taking a spread? And I think that he

1 said that no one ever told him that they were taking spread
2 at that point in time. We were talking the earlier years.
3 And I think the statement he made was a general statement
4 that he offered.

5 **Q.** Right. So it's not like you asked Mr. McLellan -- well,
6 strike that.

7 Are you aware of the transition management
8 business -- during the course of your investigation, you've
9 come to be familiar with the transition management business?

10 **A.** Yes, that was a piece of the ConvergeEx investigation, as
11 well.

12 **Q.** And you know that every transition for a particular
13 client can be different, right?

14 **A.** Sure.

15 **Q.** Right? I mean, some transitions are US-based ERISA
16 clients, some transitions are for European clients?

17 MR. FRANK: Objection, beyond the scope.

18 THE COURT: Sustained.

19 BY MR. GOLDSTEIN:

20 **Q.** You didn't ask Mr. McLellan any questions regarding the
21 NTMA transition, did you?

22 MR. FRANK: Asked and answered.

23 THE COURT: Overruled.

24 THE WITNESS: Did not.

25 BY MR. GOLDSTEIN:

1 **Q.** No. Did not ask him any questions about negotiations
2 with NTMA, right?

3 **A.** Did not.

4 **Q.** So his statement to you about disclosure had nothing to
5 do with the NTMA transition, right?

6 MR. FRANK: Objection what it had to do with.

7 THE COURT: Overruled.

8 BY MR. GOLDSTEIN:

9 **Q.** Right?

10 **A.** I don't know what was in his head when he answered that
11 question.

12 **Q.** You certainly didn't ask him about it, right?

13 **A.** I did not ask him about those transitions.

14 **Q.** He didn't say let me talk to you about the NTMA
15 transition, did he?

16 **A.** No.

17 **Q.** Same question for the Royal Mail. Did you ask him any
18 questions about the Royal Mail's transition?

19 **A.** Royal Mail?

20 **Q.** Yes.

21 **A.** No.

22 **Q.** Did you ask him any questions about the Royal Mail
23 contract?

24 **A.** No.

25 **Q.** Did you ask him any questions about what fees,

1 commissions, markups, or spreads were permissible pursuant to
2 the Royal Mail contract?

3 **A.** No, we just talked generally about when spread was
4 permissible.

5 **Q.** Right, so when you asked him a question about spreads and
6 he gave you an answer, it wasn't tied to the Royal Mail
7 transition, was it?

8 **A.** I don't know what was in his head, but we didn't ask him
9 about that transition.

10 **Q.** Right. Same thing with Dutch Doctors, was that a subject
11 matter of your conversation?

12 **A.** It was not.

13 **Q.** What about Sainsbury's? Did that come up in your
14 conversation?

15 **A.** No.

16 **Q.** Eircom?

17 **A.** Eircom?

18 **Q.** Yes.

19 **A.** No.

20 **Q.** AXA?

21 **A.** No.

22 **Q.** None of the questions that you asked him, none of the
23 subject matters that you raised with him had anything to do
24 with those entities or transitions, right?

25 **A.** Unless his general answer was comprised of, you know,

1 overflow from those entities, I'm not sure.

2 **Q.** Right. Did he say those things?

3 **A.** No.

4 **Q.** Did he talk to you about those companies?

5 **A.** Did not.

6 **Q.** Did you raise the names of those companies?

7 **A.** No.

8 **Q.** Were you talking about those companies?

9 **A.** No.

10 **Q.** Now, you know that in the United States, there are ERISA
11 guidelines or rules that govern transitions in the United
12 States, right?

13 MR. FRANK: Beyond the scope.

14 THE COURT: Sustained.

15 BY MR. GOLDSTEIN:

16 **Q.** You spoke to Mr. McLellan about ConvergeEx, right?

17 **A.** Yes.

18 **Q.** You know that ConvergeEx had -- you said it was a
19 broker-dealer based in New York, right?

20 **A.** Correct.

21 **Q.** You also know it had a broker-dealer based outside of the
22 United States, right?

23 MR. FRANK: Objection to what the agent knows.
24 That's not relevant.

25 THE COURT: What is the --

1 MR. GOLDSTEIN: Perhaps we should be heard at
2 sidebar, Your Honor.

3 THE COURT: All right.

4 (The following discussion held at the bench.)

5 MR. GOLDSTEIN: Your Honor, Mr. Frank again looked
6 back to the spreadsheet. We also have -- the spreadsheet is
7 this ConvergeEx spreadsheet that elicited testimony on direct
8 examination for a guidance spreadsheet. There's also a
9 conversation in evidence regarding Mr. McLellan --
10 Mr. Pennings and Mr. McLellan and Mr. Pennings talks about
11 double-dipping as a reference to ConvergeEx, with
12 double-dipping, is they were interposing a second
13 broker-dealer into their execution process.

14 What ConvergeEx was doing is they were taking the
15 order in the United States, they were first sending it to a
16 broker-dealer in Bermuda. That broker-dealer would add
17 spreads and give it back to the US broker-dealer. And the
18 second ConvergeEx broker-dealer would then take a second
19 spread as the reference to double-dipping. It's incredibly
20 unfair and highly misleading for the Government to elicit
21 statements about what Mr. McLellan said, tying it to this
22 ConvergeEx, and not letting us get into the -- what they were
23 really talking about, which is the ConvergeEx model.

24 And so whether they talk about it, if the agent is
25 going to deny it or not, he knows what the ConvergeEx model

1 was, and if they're trying to contribute the state of mind to
2 Mr. McLellan, the jury should hear what the ConvergeEx model
3 was.

4 MR. FRANK: He specifically asked the defendant --
5 and counsel is welcome to ask about whether he knew they were
6 taking spreads -- whether he knew whether it was permitted by
7 contract, and what he knew about it. None of this came out.
8 The only relevance to this was the defendant's state of mind.
9 There was no discussion of double-dipping. There was no
10 discussion of --

11 THE COURT: This is plainly beyond the scope. I
12 think what he's saying is, that where this is relevant beyond
13 the scope --

14 MR. FRANK: I'm sorry, Your Honor. It's not just
15 beyond the scope; it's beyond what they discussed. And so
16 the relevance of what they discussed, whether it's going to
17 the scope of my question or not, is only what was in the
18 defendant's head and none of this was in the defendant's
19 head. What he's trying to do is elicit what's in the agent's
20 head. The agent --

21 THE COURT: If I understand it, I think he's saying
22 it's in the defendant's head, because there was a discussion
23 between him and Pennings about double-dipping.

24 MR. FRANK: There wasn't, though. We have no
25 testimony about a discussion between him and Pennings about

1 double-dipping. The only reason the spreadsheet -- the only
2 reference to the spreadsheet with respect to the defendant --

3 THE COURT: I thought he said that Pennings had a
4 discussion.

5 MR. GOLDSTEIN: No, it's in a recording that the
6 Government introduced.

7 MR. FRANK: Not with respect to ConvergeEx, at all.
8 The August 26th conversation, there was no discussion of
9 ConvergeEx. In the August 26th discussion, which was a year
10 and several months after the ConvergeEx discussion, which was
11 in early 2010, there was a separate conversation and that
12 discussion about whether it's permissible to take a fee and a
13 spread at the same time. Do you know if that's legal in the
14 UK.

15 And Pennings responded in that conversation, I
16 believe a fee and a spread are legal. It's double-dipping
17 that I think is illegal in the UK. That has nothing to do
18 with what was in the defendant's head in February or January
19 of 2010 about ConvergeEx's business model. The only thing we
20 spoke about with respect to ConvergeEx was the spreadsheet
21 that he testified to, was that the spreadsheet was --

22 THE COURT: Here's the question that I have about
23 going beyond. It's mostly the scope, but it's at the scope
24 of the direct of the witness testimony. You can get into
25 ConvergeEx generally, but the question is, what is the

1 foundation that connects whatever business model information
2 or not, that you would have to the defendant? Because right
3 now, we have evidence, a little bit. So the question is what
4 gives rise to his understanding of the improper, so to speak,
5 or the double-dipping, which he might not know about.

6 MR. WEINBERG: Can I take a shot at this, Judge?

7 THE COURT: Yes.

8 MR. WEINBERG: They emphasized it today and
9 reinforced McLellan's receipt of the spreadsheet, which was
10 sent to Pennings, where Pennings essentially says this is
11 unethical and confronts -- the reason it's unethical is not
12 that it matches State Street's later business model, the
13 reason that they thought it was worth sending a spreadsheet
14 and confronting a client is that ConvergeEx was doing
15 something that was off the charts for banks. They were
16 charging these --

17 MR. GOLDSTEIN: Double-dipping.

18 THE COURT: What's the charge, though, the
19 spreadsheet? What does the spreadsheet show?

20 MR. WEINBERG: It shows the ConvergeEx double
21 markups. Testimony shows the markup.

22 MR. FRANK: No, it doesn't show.

23 MR. WEINBERG: It shows the --

24 MR. FRANK: We can look at the spreadsheet, Your
25 Honor. The spreadsheet shows -- there's a column for

1 commissions and there's a column for spreads, there's a
2 column for FX, and there's a column for everything else. It
3 doesn't show double-dipping. There's no discussion of
4 double-dipping.

5 MR. JOHNSTON: It wasn't the person who asked
6 questions about the spreadsheet? In fact, Ed Pennings,
7 the --

8 MR. WEINBERG: No, because he's not a reliable
9 person to give a truthful answer.

10 MR. JOHNSTON: I know you may not like it.

11 MR. WEINBERG: So on -- the spreadsheet has
12 columns. One is the disclosed commissions; the other is the
13 undisclosed second spread, bigger.

14 THE COURT: There's two columns with respect to the
15 spreads. There's one --

16 MR. WEINBERG: It doesn't say double-dipping.

17 THE COURT: I understand that, but is there two
18 columns reflecting commissions or spreads?

19 MR. FRANK: There's a column reflecting commission
20 and there's a column reflecting -- I actually don't know that
21 it's called spreads, Your Honor. I'd have to look at the
22 spreadsheet. I think it's called trading revenue or
23 something like that. Trading --

24 MR. WEINBERG: This agent would know that their
25 books and records were --

1 THE COURT: All right. I'm going to overrule the
2 objection, but it's beyond the scope. So ordinarily I would
3 say -- I wouldn't make you recall the witness, because it's
4 just a waste of time, but I will make you ask some direct
5 questions. He's an agent, so I understand it's -- but I
6 think that it should be more in the nature of direct
7 examination, because it's clearly beyond the scope of what
8 they have presented. And what you're looking for now is
9 just -- is not really related, per se, to the interview.
10 This is what they discussed or --

11 MR. FRANK: So what is Your Honor allowing,
12 exactly?

13 THE COURT: I'm allowing him to essentially elicit
14 from him knowledge about things that he asked about
15 ConvergeX. It's up to you if you want to go there. I don't
16 know what the risk is to that.

17 MR. GOLDSTEIN: Okay.

18 THE COURT: But it's beyond the scope of the
19 direct, but given that he was a major customer and given that
20 the two columns -- what I understand you all to think with
21 the ConvergeX work, I see that there's enough of a connection
22 to allow this -- that there's enough of a connection for an
23 evidentiary purpose to allow evidence about this, because
24 there's a reasonable inference that McLellan would know that,
25 given these things. That said, I'm not going to completely

1 let you go to direct exam, because he's an agent, but it's
2 more in the nature of a direct exam.

3 MR. FRANK: Your Honor, I would ask that you limit
4 the scope and not go down a wild goose chase for the
5 ConvergeEx road. If he can tie it with a few questions, but
6 if we're going to go into an explanation of ConvergeEx --
7 because I'll note at this point in the investigation, January
8 of 2012, they had only been investigating ConvergeEx for a few
9 months.

10 MR. GOLDSTEIN: The state of the investigations,
11 Your Honor, so they can take the commissions on two separate
12 levels, broker-dealer level.

13 THE COURT: Okay.

14 (Bench conference concluded.)

15 THE COURT: So ladies and gentlemen of the jury,
16 what you've seen so far in the case is direct examination has
17 been direct, nonleading questions, cross-examination is
18 leading questions, and you've heard, occasionally, objections
19 about the scope -- and as a general matter, the
20 cross-examination stays within topics related to direct
21 examination, or related to sort of things that go to -- help
22 you evaluate the credibility of the witness.

23 Sometimes we've been discussing -- and what you're
24 going to hear in a moment -- is some questions beyond -- some
25 of which may go beyond the scope of the direct. So there --

1 the reason we're doing it this way and having it now, first
2 of all, is so that we don't have to have the witness come
3 back another time. He's here. It's more efficient to do it
4 now. But when it goes beyond the scope of the direct, then
5 ordinarily the questioning lawyer asks direct questions.
6 Because now you're presenting information from the witness,
7 you're not cross-examining them and you go into some separate
8 topic. So you ordinarily hear just direct questions.

9 It may be a little bit -- in this case, the witness
10 is a Government -- FBI agent, a Government employee, so
11 there's a little more latitude for Mr. Goldstein in terms of
12 the form of his questions, but nonetheless, it's beyond the
13 scope, so it would be more in the nature of a direct
14 examination, when he asks these questions. And we've just
15 been having -- that's what the discussion was about.

16 So go ahead, Mr. Goldstein.

17 BY MR. GOLDSTEIN:

18 **Q.** Agent McGillicuddy, you testified that ConvergeEx had a
19 broker-dealer located in New York, correct?

20 **A.** Yes.

21 **Q.** They had a second broker-dealer located in another
22 location, correct?

23 **A.** They had subsidiaries around the globe, yes.

24 **Q.** And was there a broker-dealer based in Bermuda?

25 **A.** There was.

1 **Q.** And ConvergeEx was routing orders, execution orders?

2 MR. FRANK: Objection.

3 **Q.** Were --

4 BY MR. GOLDSTEIN:

5 **Q.** Were they routing orders to more than one of their
6 broker-dealers?

7 **A.** Yes.

8 **Q.** Okay. And explain that to the jury, please.

9 **A.** So our investigation revolved around ConvergeEx's program
10 trading business and that order flow generally came in from a
11 sales trading desk and ConvergeEx Global Markets had two
12 desks, one in New York and one in London, but their executing
13 desks were elsewhere, one being in Bermuda, and one being in
14 Hong Kong.

15 **Q.** And so were they taking multiple -- were they taking
16 spreads at two different locations for transactions, sort of
17 double-dipping, so to speak?

18 **A.** I don't know what you mean by double-dipping, but the
19 spread was taken at the executing desk, is my understanding.

20 **Q.** And was there a second spread or commission taken at a
21 subsequent broker-dealer desk?

22 **A.** Not to my knowledge.

23 **Q.** And so explain it to the jury, please.

24 **A.** Explain what?

25 **Q.** The process how the trades routed from one desk to

1 another.

2 **A.** Okay. There would be -- I'm going to say CGM, ConvergeX
3 Global Markets. There would be a sales trader --

4 **Q.** Where are they located?

5 **A.** Could be in New York, could be in London, depending on
6 the client.

7 **Q.** All right.

8 **A.** So an order would come in. The sales trader would take
9 the order, would route the order to various desks, because if
10 it was a block trade, they could route it to an executing
11 desk in New York. If it was a program trade, they could
12 route it to either Bermuda or Hong Kong to be executed,
13 depending on the region.

14 **Q.** Okay. And was there a commission taken in Bermuda or
15 Hong Kong in that instance?

16 **A.** I believe the commission in that instance would have been
17 taken by the New York or the London broker-dealer.

18 **Q.** Okay. And was it necessary to send these trades to
19 Bermuda or Tokyo to execute the trade?

20 MR. FRANK: Objection.

21 THE COURT: Overruled.

22 THE WITNESS: Was it necessary?

23 BY MR. GOLDSTEIN:

24 **Q.** Yeah. To execute the trade, did they have to send it to
25 the offshore broker?

1 **A.** No, not in all cases.

2 **Q.** Okay. Getting back to your interview with Mr. McLellan.
3 He told you that, after 2002, the relationship with ConvergeEx
4 dropped off, correct?

5 **A.** He did.

6 **Q.** He told you that State Street moved its business to
7 electronic trading platforms, such as Instanet, right?

8 **A.** Yes.

9 **Q.** Instanet is an equity platform, correct?

10 **A.** I don't know.

11 MR. GOLDSTEIN: May I have one moment, Your Honor?

12 THE COURT: You may.

13 BY MR. GOLDSTEIN:

14 **Q.** You also talked to -- Mr. McLellan told you about
15 conversations that he had with an individual regarding
16 planned sponsor business, right?

17 MR. FRANK: Objection. Beyond the scope.

18 MR. GOLDSTEIN: It's the subject of the interview,
19 Your Honor.

20 THE COURT: Overruled.

21 BY MR. GOLDSTEIN:

22 **Q.** You spoke to Mr. McLellan about the planned sponsor
23 business, right?

24 **A.** He did.

25 **Q.** And that's US-based ERISA business, correct?

1 **A.** Don't know.

2 **Q.** Do you know anything about ERISA?

3 MR. FRANK: Objection to what the agent knows about
4 ERISA, Your Honor.

5 THE COURT: Overruled.

6 THE WITNESS: ERISA came up in a limited basis on
7 the ConvergeEx case, generally when talking about a fiduciary
8 relationship.

9 BY MR. GOLDSTEIN:

10 **Q.** In the United States?

11 **A.** I don't know. I don't know if it was exclusive to that.

12 MR. GOLDSTEIN: Nothing further, Your Honor.

13 **REDIRECT EXAMINATION BY COUNSEL FOR PLAINTIFF**

14 BY MR. FRANK:

15 **Q.** So Special Agent McGillicuddy, in ConvergeEx, they were
16 promising one price and charging another?

17 MR. GOLDSTEIN: Objection, Your Honor.

18 THE WITNESS: Explain what you mean by that.

19 THE COURT: Overruled.

20 BY MR. FRANK:

21 **Q.** ConvergeEx was promising its customers one price and
22 secretly charging another?

23 **A.** They were taking markups without customer's knowledge.

24 **Q.** They were taking disclosed commissions?

25 **A.** Yes.

1 Q. And hidden markups?

2 A. Yes.

3 Q. And that was the subject of your investigation?

4 A. It was.

5 Q. And that's what you went to talk to the defendant about?

6 A. Yes.

7 Q. And he told you that when he routed trades through
8 ConvergeX, they paid a commission?

9 THE COURT: Sustained as to the leading.

10 BY MR. FRANK:

11 Q. What, if anything, did he tell you State Street paid when
12 they routed -- knowingly paid when they routed trades to
13 ConvergeX?

14 A. The commission.

15 Q. And what, if anything, did he tell you he knew about
16 whether State Street was paying more than that?

17 A. He -- he told us during the period of time that State
18 Street was using ConvergeX for a lot of order flow, he was
19 aware that they were charging a commission. And over the
20 course of time, there were about three events which led him
21 to believe that ConvergeX may have been taking a spread.

22 Q. What, if anything, did he tell you he knew at the time
23 that he was paying the commission about whether they were
24 also taking a spread?

25 A. That no one ever told him that ConvergeX was taking a

1 spread.

2 **Q.** What, if anything, did he tell you he did when he
3 suspected they were taking a spread?

4 **A.** So after he had gathered these three different data
5 points that they may have been taking a spread, when it
6 became clear that ConvergEx -- that State Street may again be
7 sending significant order flow to ConvergEx, he took measures
8 to make sure that a spread could not be taken.

9 **Q.** You were asked some questions about what -- when the
10 defendant told you he believed it was permissible to take a
11 spread?

12 **A.** Yes.

13 **Q.** Do you recall those questions?

14 **A.** Yes.

15 **Q.** And you were asked whether he had told you whether you
16 were talking about specific State Street clients at the time.
17 Do you recall that?

18 **A.** Yes.

19 **Q.** And I believe your testimony was you were not talking
20 about specific clients?

21 **A.** We were not.

22 **Q.** What, if anything, did he tell you about when he believed
23 it was permissible to take a spread?

24 MR. GOLDSTEIN: Objection.

25 THE COURT: What's the objection?

1 MR. GOLDSTEIN: Beyond the scope and asked and
2 answered.

3 MR. FRANK: It's not beyond the scope. It's
4 directly responsive.

5 THE COURT: Overruled.

6 THE WITNESS: He said that he thought it was
7 permissible to take the spread, if the spread was fully
8 disclosed, and the client was not a fiduciary.

9 BY MR. FRANK:

10 Q. And you were asked some questions about the time
11 period -- well, about his statement to you that State Street
12 fully disclosed its own commission and fee structure. Do you
13 recall that?

14 A. Yes.

15 Q. Did he narrow that to a specific time period?

16 A. Hard to say. We were talking about an early time period,
17 but the questions were more general, as well. So I'm not
18 sure.

19 Q. And you were asked some questions about his statement to
20 you that State Street does not take spread? Do you recall
21 that?

22 A. Yes.

23 Q. And that statement was in reference to a conversation he
24 had had just a few months before; is that correct?

25 A. Say that again?

1 Q. Well, do you recall that he told you about a conversation
2 that he had had a few months before your interview?

3 A. Yes.

4 Q. And what, if anything, did he tell you about State Street
5 taking a spread in the context of that conversation?

6 MR. GOLDSTEIN: I object, Your Honor.

7 THE COURT: Sustained.

8 BY MR. FRANK:

9 Q. The conversation he described was a few months before?

10 A. Yes.

11 Q. Was it within that -- what, if anything -- what context
12 was it within that he told you about State Street not taking
13 a spread?

14 A. He was, at the time, having a breakfast meeting with
15 ConvergEx's CEO, exploring, I guess, an employment
16 opportunity, and he felt that the CEO was pumping him for
17 information about State Street's practices and whether they
18 were taking a spread, and he told the CEO that State Street
19 did not take a spread.

20 Q. And that was a few months before he met with you?

21 A. Yes.

22 Q. You were also asked some questions about his statement
23 concerning best execution, best price, and lowest commission?

24 A. Yes.

25 Q. What, if anything, did he tell you about lowest

1 commission being a factor in State Street's selection of a
2 broker?

3 **A.** He said that they selected their brokers based on their
4 ability to provide best execution, best price, and lowest
5 commission rate.

6 MR. FRANK: Thank you. No further questions.

7 THE COURT: Recross, Mr. Goldstein?

8 MR. GOLDSTEIN: Thank you, Your Honor. May I just
9 stand over here, Your Honor?

10 THE COURT: You may.

11 **RECROSS-EXAMINATION BY COUNSEL FOR DEFENDANT**

12 BY MR. GOLDSTEIN:

13 **Q.** Agent McGillicuddy, you testified that -- just in
14 response to Mr Frank's questions told you that Mr. McLellan
15 told you that they did not take spreads on the trades. That
16 was your testimony. That's what he said to you, right?

17 **A.** I testified twice on that topic. One was that he told me
18 that State Street did not take a spread on the types of
19 trades that are routed to ConvergEx.

20 **Q.** Let me stop you right there. That's exactly my point,
21 meaning when --

22 MR. FRANK: Objection to what counsel's point is,
23 Your Honor.

24 THE COURT: Sustained.

25 Just go ahead, Mr. Goldstein.

1 BY MR. GOLDSTEIN:

2 Q. Thank you, Your Honor. When he made that statement, he
3 limited that particular statement to the types of trades they
4 would have routed to ConvergeEx, right?

5 A. That's right.

6 Q. And those were equity -- US-based equity trades, right?

7 A. I don't think we asked him that question. My
8 investigation was on equity trades; so I would have
9 understood that to be talking about equity trades.

10 Q. Okay. And when you testified regarding ConvergeEx model
11 in terms of a markup and a spread, what ConvergeEx was doing
12 was taking a markup and then also taking an agency
13 commission, correct?

14 MR. FRANK: Beyond the scope.

15 THE COURT: Overruled.

16 THE WITNESS: That's my understanding, yes.

17 BY MR. GOLDSTEIN:

18 Q. And when Mr. McLellan told you that State Street's
19 practice was to disclose taking a spread, what he told you
20 was it was disclosing that a spread was going to be taken, as
21 contrasted with fully disclosing what that spread would be,
22 correct?

23 MR. FRANK: Objection.

24 THE COURT: Overruled.

25 THE WITNESS: I don't understand the question. Can

1 you repeat it, please?

2 BY MR. GOLDSTEIN:

3 **Q.** Yeah. Do you understand that there's a difference
4 between disclosing to a client that a spread will be taken or
5 fully disclosing the scope of what the spread was that had
6 been taken? There's a difference there, right?

7 **A.** Are you talking about qualitative versus quantitative
8 disclosure?

9 **Q.** Yes.

10 **A.** Okay.

11 **Q.** What Mr. McLellan told you was that State Street had a
12 practice of disclosing that they were taking a spread as
13 contrasted with a statement that he told you they fully
14 disclosed what the spread was. Do you recall that in your
15 report?

16 **A.** I don't.

17 MR. GOLDSTEIN: Nothing further, Your Honor.

18 THE COURT: Thank you very much, sir, you're
19 excused.

20 Are we now, just one left?

21 MR. FRANK: No, we're done for today, Your Honor.

22 THE COURT: Right, but I mean for tomorrow.

23 MR. FRANK: That's correct, Your Honor.

24 THE COURT: All right. And then that's it?

25 MR. FRANK: We're going to evaluate tonight, Your

1 Honor, but that's the current finding.

2 THE COURT: Okay.

3 So ladies and gentlemen, and --

4 Generally, as a general matter, where we stand,
5 same with respect to the schedule in terms of --

6 MR. FRANK: Absolutely, Your Honor.

7 THE COURT: All right. So remember I told you we'd
8 be done early. We're done today. Tomorrow the Government
9 has another witness it's going to call and that witness is
10 coming from Europe. And for various scheduling reasons
11 couldn't be here today and that's why we're not going to
12 1 o'clock for that witness and that's where we're finishing
13 in a moment.

14 So tomorrow morning we'll resume at 9:00 and the
15 Government will call that witness from Europe and then
16 they're -- they anticipate that the Government will finish
17 its case tomorrow. It may finish with that witness. And
18 what Mr. Frank is referring to is he is just going to look
19 over -- and Mr. Johnston -- and see if there's anything else
20 that they think they need.

21 So in any event, then we'll move -- whenever the
22 Government finishes, we'll move to the defense case, but we
23 remain on the schedule I told you on Friday, which is I
24 anticipate you'll receive the case no later than early next
25 week. What I mean is receive the case for your deliberations

1 when we're done with the presentation of evidence.

2 So keep an open mind. You haven't heard all the
3 evidence. You haven't heard closing arguments or my
4 instructions on the law. Don't do any independent research.
5 Don't discuss the case among yourselves or with anyone else.

6 Feel free, if you wish -- I imagine the snack is
7 there, feel free to stay, if you wish, or in any event, court
8 is in recess for the day. We won't have any more trial
9 proceedings today and we'll resume tomorrow morning at 9:00
10 am. Thank you for your attention. All rise for the jury.

11 (The jury exits the courtroom.)

12 THE COURT: So you mentioned before, there were a
13 couple other issues.

14 MR. FRANK: Yes, Your Honor. One is with respect
15 to the expert witnesses that the defense -- well, they're
16 both related to the expert witnesses the defense intends to
17 call.

18 THE COURT: What's -- that's the motion to compel,
19 basically, right?

20 MR. FRANK: Yes, Your Honor.

21 THE COURT: What's the defense view?

22 MR. WEINBERG: There's no legal basis for us to
23 disclose to the Government evidence that they claim would be
24 relevant to the witness's interest. They want invoices, they
25 want, you know, engagement letters between lawyers and

1 experts.

2 You know, the reason that the Government is
3 required to do that is due process, which are rights that
4 flow to citizens, not the prosecutor. There's no rule,
5 there's no case law, there's no statute, and there's no
6 practice in my knowledge where defense lawyers have to
7 volunteer to the Government evidence that helps the
8 Government's cross-examination.

9 This is a credible expert. Mr. Frank will ask him
10 how much he's paid and he'll give him the answer tomorrow.
11 That's what cross-examination is for. You don't need to --
12 it's not a civil case. You don't get to depose the experts.

13 MR. FRANK: Your Honor, there is a practice of
14 disclosing this type of limited information, in fact, in the
15 *Sampson* case, it's my understanding that the defense
16 willingly disclosed it without any issue in that case.

17 I have no basis to know -- I have no reason to
18 think he'll lie, but I have no basis to know whether he's
19 going to be fully forthcoming about the terms of his
20 agreement, how he's being paid, what he's being paid for,
21 what other limitations there may or may not be in the
22 agreement. And so I have a -- I have a right to ask that.

23 I could subpoena it. I haven't done that. I could
24 serve him with a subpoena tomorrow morning to do that. I've
25 held off from doing that, but I'm simply asking for this

1 material, which I think gets directly to his credibility and
2 to his bias and I need to have a basis to know whether he's
3 giving me complete answers.

4 MR. WEINBERG: He's a credible person. He's a
5 former head of FINRA. He's going to give Mr. Frank candid
6 and honest answers to the specific questions that Mr. Frank
7 asks.

8 THE COURT: So I'll tell you -- interesting -- I
9 read the motion last night. And it's an interesting issue.
10 You are correct that in the *Sampson* case, no one ever asked
11 me about it, I don't think, in the *Sampson* case. There were
12 a lot of experts in that case and my memory is that -- I
13 never actually saw -- I assume, actually, there was that kind
14 of disclosure and I don't doubt, if you confirmed it, that
15 that happened, Mr. Frank. Certainly, there was a lot of
16 fulsome cross-examination at various point of all the experts
17 about that. And I had the impression, as I think about it,
18 that that had been disclosed. I get why you want it and I
19 understand the practicality.

20 I just want to think a little bit about it and I
21 read it last night, but didn't really get a chance to ponder
22 it much, because -- and I noticed how the rule is written,
23 the local rule and so -- but I will address it in a short
24 order, shortly, one way or another. I just want to think a
25 little bit about it.

1 I just wanted to hear, before I did anything
2 further. I wanted to see what the defendant's position was.
3 Now I understand their position and so I'll resolve that
4 before.

5 MR. FRANK: So Judge, so Your Honor's going to rule
6 whether, in your discretion, they should give it to us?
7 Because the other issue is I do think I would be entitled to
8 subpoena it from the witness. I don't think it's a protected
9 document in any way. And so we prefer just to go --

10 THE COURT: Yes, I understand you prefer to have me
11 say just give it to them and get it, than do a subpoena.

12 MR. FRANK: Right. And -- so the only thing I
13 would ask is, depending on -- since we don't know the outcome
14 of Your Honor's decision, that the witness be directed to
15 bring those documents -- all their expert witnesses be
16 directed to bring those documents with them in case we choose
17 to go the subpoena route.

18 THE COURT: I'll address that, too, in the order.

19 MR. WEINBERG: He's en route from the Washington
20 area to Boston, Your Honor. I don't know what he has or not,
21 but I doubt that it's the regular course of practice for an
22 expert to be lugging his financial records in case the
23 Government subpoenas them.

24 THE COURT: I'll think about all that. I'll get
25 the scope of it.

1 What's the other issue?

2 MR. FRANK: The other issue is I understand that --
3 so, as I mentioned last week, Graham Dixon is a fact witness
4 in this case. We've elected not to call him in our case in
5 chief, but reserve the right to call him as a rebuttal
6 witness. We've provided very extensive disclosures about
7 him, including 12 pages of single-paced 302s, his reports of
8 several transitions that he analyzed.

9 He has also complied with the letter rogatory
10 request of counsel, produced voluminous materials to the City
11 of London Police which counsel has. So because we are now
12 calling him as a rebuttal witness, because -- potentially,
13 because counsel objected to some of the questions we asked at
14 the beginning of this case of Richard Boomgaardt concerning
15 custom and practice in the UK, in the transition management
16 business --

17 THE COURT: My memory, such as it is, is that I, by
18 and large, overruled those, saying he was a fact witness and
19 allowed you to elicit those things.

20 MR. FRANK: That's right. Understood. And we
21 believe that, on the same basis, Mr. Dixon should be able to
22 testify as a fact witness and offer lay opinion testimony.
23 But in an abundance of caution, we said, because of the
24 objection and because he's being called as a rebuttal
25 witness, we said, to the extent he is designated an expert,

1 here is -- here are his sort of views. Most of which were
2 set forth in the 302s that were previously produced.

3 We provide that to counsel last week. So I
4 understand counsel's objecting to it on that basis. He
5 hasn't yet filed an objection, so we haven't had an
6 opportunity --

7 THE COURT: You mean that it's a lay expert
8 disclosure?

9 MR. FRANK: Correct. I guess. I'm not sure -- I
10 think that's the basis. And so what we would ask is that he
11 be permitted, however that comes out, whether he's limited
12 purely to being a fact witness, whether the Court regards him
13 as an expert, that he be permitted to sit in on the expert
14 testimony, but not any fact testimony in the defense case.

15 MR. WEINBERG: I have no objection to his sitting
16 in while Mr. Menchel testifies. In the event, which I hope
17 would be unlikely, that Your Honor would permit him to
18 testify as a rebuttal expert, but I do think the issue of
19 what he's permitted to testify to and where it falls ought to
20 be reserved until you hear the defense case and see what
21 there is to rebut.

22 THE COURT: That sort of solves your --

23 MR. FRANK: That does solve the problem.

24 Do I understand you to be saying it's just
25 Mr. Menchel tomorrow? Or it --

1 MR. WEINBERG: He can sit through any experts he
2 wants.

3 MR. FRANK: I'm asking for scheduling purposes.

4 MR. WEINBERG: Yes.

5 MR. FRANK: Just Mr. Menchel?

6 MR. WEINBERG: No, we have two experts ready to
7 testify tomorrow, in the event that the Government rests at
8 10 o'clock and we think that they'll reasonably fill the rest
9 of the day.

10 MR. FRANK: And that's --

11 MR. WEINBERG: Travaglini and Menchel.

12 MR. FRANK: Okay. I'm just reconfirming, because
13 he just kept referring to Menchel.

14 THE COURT: So is there anything that I should look
15 at about what -- is there anything that you've given to the
16 Government -- what, if anything, have you given to the
17 Government that describes what they're going to testify to?

18 MR. WEINBERG: They have a detailed disclosure
19 letter that I believe the Court has, but I'm glad to --

20 THE COURT: Can you just either provide it to me
21 again, or tell me where it is in the docket. Either one is
22 fine.

23 MR. WEINBERG: I don't know that it's in the
24 docket. It's in my briefcase and I'll hand it to you.

25 THE COURT: Just to read it and it would be helpful

1 for me to read it.

2 MR. FRANK: Your Honor, we also have asked for and
3 not received what materials the witnesses relied on in
4 forming their expert opinion and that has not been provided
5 to us. So we asked that they be directed to provide that to
6 us, as well.

7 And we'd also ask, since we're now 48 hours from
8 Wednesday, that we be told who the witnesses are for
9 Wednesday.

10 THE COURT: I can keep this, Mr. Weinberg?

11 MR. WEINBERG: Yes, Your Honor. I'm sure there are
12 many of them back at the office.

13 THE COURT: Who will come after the experts -- I'm
14 sorry, the two experts you're calling are Menchel,
15 M-e-n-c-h-e-l?

16 MR. WEINBERG: Yup.

17 THE COURT: And who is the one after that?

18 MR. WEINBERG: Travaglini.

19 THE COURT: Travaglini. And then if they both
20 finished tomorrow, who will come Wednesday?

21 MR. WEINBERG: The truth is, I'm not certain.
22 We're going to be making decisions tonight regarding
23 potential Wednesday testimony. It could be Mr. Bradley,
24 who's a third expert, it could be Mr. Bednall. I don't know
25 and I don't want to make representations. We're going to

1 obviously consider and talk to Mr. McLellan about his rights
2 and we'll report to the Court tomorrow.

3 MR. FRANK: I object, Your Honor. We were directed
4 to provide our witnesses 48 hours in advance. We provided
5 our first witness a week in advance and then we provided --
6 and then our second witness many days in advance. This is --
7 this is not right that we are now 48 hours from testimony,
8 potentially of the defendant, potentially of experts, I don't
9 know who else, and they haven't decided yet and -- how are we
10 supposed to prepare for that?

11 MR. WEINBERG: And we may not decide until the
12 testimony is complete tomorrow when we have a chance to talk
13 to our client. He has a constitutional right to make a
14 decision, every defendant does. They make an informed
15 decision, they evaluate the state of the evidence with their
16 lawyers. I know of no rule that Mr. Frank -- Mr. Frank wants
17 to create a rule that --

18 THE COURT: Mr. McLellan -- his testimony stands in
19 a different position than other witnesses. And --

20 MR. WEINBERG: If he doesn't testify, then we -- we
21 are -- after we see the testimony of the two experts, we will
22 make a decision on Mr. Bradley and Mr. Bednall.

23 MR. FRANK: Your Honor, the law of this case is
24 that 48 hours' notice was to be provided and we're now 48
25 hours away and they're refusing to provide notice and they're

1 telling us that they're not going to provide notice until the
2 night before the testimony. Then we would ask for a delay in
3 the trial, so we can prepare. This is completely outrageous.

4 MR. WEINBERG: Would Mr. Frank feel better if I
5 said Mr. Bednall and Mr. Bradley would be the follow-up
6 witnesses and then I elect not to call them. I told him who
7 the witnesses are, what the fork in the road is. We'll be
8 making those decisions after testimony tomorrow.

9 THE COURT: So what you're telling me is that after
10 the two experts tomorrow, you either might call the one or
11 both -- the next witnesses would be those two experts, if you
12 choose to call them?

13 MR. WEINBERG: Yes.

14 THE COURT: And if you didn't call them, if you
15 chose not to call them, then you wouldn't call them, and that
16 then the further question remains whether -- what Mr.
17 McLellan will do.

18 MR. WEINBERG: Yes, Your Honor.

19 THE COURT: And will there be other witnesses after
20 that?

21 MR. WEINBERG: If Mr. McLellan testifies, there
22 would be supportive witnesses. We've given Mr. Frank the
23 list of potential reparation and character witnesses. We
24 haven't made a decision. I don't generally call character
25 witnesses unless I call the defendant, but I identify the

1 character witnesses in case the defendant --

2 THE COURT: Would it be fair to say, just in terms
3 of the order, after these two experts, it's the next two
4 experts, if they're called, Mr. McLellan, if he's called, and
5 if Mr. McLellan is called, then certainly those other
6 witnesses that you identified, and if not --

7 MR. WEINBERG: Certainly, our current plans are,
8 assuming Mr. McLellan does not testify, it would be the two
9 experts, if anyone at all, after tomorrow's testimony. If
10 Mr. McLellan does testify, we'll be making selections amongst
11 the character witnesses.

12 THE COURT: Who might follow after?

13 MR. WEINBERG: Yes. And we haven't -- we have not
14 made -- and I say that to the Court in candor -- the
15 decision. And won't make that decision until after we see
16 how the testimony goes tomorrow, whether we feel it is in the
17 defendant's interest to call additional experts or not and
18 then we'll discuss with Mr. McLellan the need for a final
19 decision.

20 MR. FRANK: So in other words, 48 hours before the
21 testimony, I'm either supposed to be preparing for the
22 testimony of two experts, one of whom I was previously
23 advised would not be called and -- or I'm supposed to prepare
24 for the possible testimony of the defendant, all of that
25 tonight, but I don't know what I'm preparing for?

1 MR. WEINBERG: I prepared for Mr. Pennings and
2 Boomgaardt for weeks. I'm sure Mr. Frank --

3 MR. FRANK: Well --

4 MR. WEINBERG: Let me finish, Steve. He's got a
5 very detailed list of what the four experts would testify to.
6 He got them in the timely way as opposed to the late
7 disclosures and rebuttal experts, or so-called rebuttal
8 experts. He's had this since 40 days prior to June 4th.
9 He's prepared, Judge.

10 And I have every right -- I don't carry a burden in
11 this case, as Your Honor will instruct, I reserve my right to
12 not call a single witness. I reserve my right to call
13 experts three and four, depending on how experts one and two
14 do. That's the best I can do for Mr. Frank.

15 MR. FRANK: Your Honor, if counsel was so prepared,
16 then there was no reason I needed to tell him a week in
17 advance who my first witness was going to be and then who my
18 second witness is going to be. There's additional
19 preparation that happens within the last 48 hours. I would
20 move to preclude those two witnesses if counsel cannot
21 represent today that he's calling them.

22 THE COURT: That's denied.

23 MR. FRANK: This is -- Your honor, I mean -- the --

24 THE COURT: The motion to exclude the defendant's
25 experts that they have disclosed, because he hasn't

1 unequivocally said he's calling them in 48 hours is denied.
2 And that motion is not particularly well grounded, Mr. Frank,
3 and you know that.

4 MR. FRANK: I'm not contesting Your Honor's ruling.

5 THE COURT: So the question as to preparation is a
6 different issue. Pick and choose the issues.

7 At the moment, the way I see things is this: What
8 I understand Mr. Weinberg to be saying and where things are,
9 is that the -- in the sequence of witnesses he's going to
10 call, the next people up after the two witnesses would be
11 these further two experts and if -- so he may not call those
12 two experts.

13 If he doesn't call -- the way I see the scenario as
14 playing out, okay, is he might call those two experts. He
15 might not. And then there will be a decision about Mr.
16 McLellan testifying. He might or might not. If he doesn't
17 call the two experts and he doesn't call Mr. McLellan, he's
18 likely -- what I hear him saying is he's likely done with his
19 evidence after those two experts.

20 MR. WEINBERG: That is correct.

21 THE COURT: If, in fact, he does that, you won't
22 have been ill prepared. If he calls some of those -- the
23 people to focus on next, what I understand, are the two
24 people. If it turns out tomorrow he says that he's not
25 calling those two people and he's calling Mr. McLellan. And

1 on Wednesday we can talk about, then, whether you need extra
2 time to prepare, given that it happened a lot quicker, but
3 now is not the time for that.

4 MR. FRANK: I understand, Your Honor.

5 THE COURT: And I'm certainly not excluding the
6 witnesses.

7 MR. FRANK: As long as Your Honor will entertain a
8 motion to --

9 THE COURT: I will entertain any motion any one of
10 you file. There's never been a case when I haven't
11 considered it. I will consider any request that you make. I
12 will consider it on the merits of the request and under the
13 circumstances, as I have tried to do throughout this case, is
14 to give everyone a full and fair opportunity to --

15 I'm not looking to prevent you from preparing. I'm
16 not looking to prevent Mr. Weinberg from preparing, although
17 I know he feels that I rushed him to trial and so we'll just
18 cross that bridge when we get there. I will say --

19 MR. WEINBERG: I will make one other statement that
20 might resolve this, which is that if Mr. McLellan elects to
21 testify, he would precede the two experts. So if Mr. Frank
22 is looking for who would come after the two experts, and all
23 of them are going to testify, the two experts and Mr.
24 McLellan -- Mr. McLellan is going to go --

25 THE COURT: So actually -- I see.

1 MR. WEINBERG: So it's Mr. McLellan and the
2 Government ought to get ready, although all defendants get to
3 exercise constitutional decisions and it won't be decided
4 fully until tomorrow.

5 MR. FRANK: That actually makes it more
6 complicated, Your Honor, because a moment ago my
7 understanding was the two experts and I was going to prepare
8 tonight for those two experts and now I'm being told I need
9 to prepare for the defendant, but if the defendant elects not
10 to testify, then all of a sudden, I could be faced with those
11 two experts.

12 MR. WEINBERG: No, the two experts, Mr. Menchel and
13 Mr. Travaglini are testifying tomorrow. Mr. Frank has known
14 that for a week.

15 THE COURT: No, I understand that.

16 If Mr. McLellan doesn't testify, it's -- in other
17 words, the next witness is Mr. McLellan after those two
18 experts, unless you decide not to -- unless Mr. McLellan
19 decides not to -- decides to exercise his personal,
20 independent right that's his and decides not to testify. And
21 then, in which case, you might or might not call those other
22 two experts.

23 MR. WEINBERG: Precisely. We'll know about the
24 experts after our first two experts testify and we'll advise
25 Mr. Frank accordingly. This is not unusual, Judge. What's

1 unusual is Mr. Frank's insistence on --

2 THE COURT: At the moment we are where we are. I
3 have one thing I just want to tell you, not related to what
4 we've been -- not exactly related to what we've been
5 discussing, but I'd like to tell you at sidebar.

6 (The sidebar conference was sealed at 11:10 a.m.)

7 (The following discussion held at the bench.)

8 THE COURT: So unrelated to this discussion, I've
9 been thinking about generally a particular issue in criminal
10 cases related to testimony of defendants, partially arising
11 out of issues in 2255.

12 I'm thinking and the reason that I wanted to bring
13 it up now, so you can contemplate it before. This only
14 applies -- well, I guess it might apply either way whether he
15 testifies or doesn't testify. It certainly applies if he
16 does, to have a -- out of the hearing of the jury, a very
17 brief colloquy, like where I probably just would ask two
18 questions, like do you understand that your decision to
19 testify is your personal decision to exercise, have you had a
20 full and fair opportunity to talk to your lawyer about it,
21 and are you making that -- after having a full and fair
22 opportunity, are you making a decision not to testify.

23 MR. WEINBERG: I have no problems with Your Honor
24 doing that, but I would ask that it be done in chambers and
25 not in the -- not accessible to the media, which would only

1 focus if -- let's assume he doesn't testify. The last thing
2 we want is to have an article, Mr. McLellan doesn't --

3 THE COURT: Could we do it like at sidebar, or do
4 you want me to do it -- do you want me to do it in the lobby
5 in the back?

6 MR. WEINBERG: The lobby in the back, since there
7 is press here, and if the *Globe* raised its lead with
8 Salemme's deciding not to testify as a public matter, and --
9 I see 360 is covering it. I don't know whether they were
10 going to get any coverage as it relates to --

11 THE COURT: Okay. You don't care if I have that
12 conversation?

13 MR. FRANK: I do not.

14 THE COURT: All right. So I guess we could have a
15 period of time to do it in the back and do it in the back and
16 just think about it. Okay. Fine. Okay.

17 MR. WEINBERG: And I will discuss that with Mr.
18 McLellan, in the event -- did you want to do that regardless?

19 THE COURT: It hadn't occurred to me either way.

20 MR. WEINBERG: I do understand, assuming he elects
21 not to, that certainly defendants on habeases have used that
22 as a basis to challenge.

23 THE COURT: And honestly, the reason it comes out
24 is what happens sometimes is honest defense. When it's down
25 the road, they don't remember the specific conversation.

1 They remember like their practice, but they don't necessarily
2 have a specific recollection of the conversation and then I'm
3 faced with a question of whether I have to have an
4 evidentiary hearing two years down the road. And the
5 question factually, in the face of one affirmative assertion,
6 versus a general practice, and then I've asked the question
7 on colloquy. And it seems fair, because in fact if there
8 were a misunderstanding by the defendant, it is his personal
9 right, I'd rather have him know and be able to exercise.

10 MR. WEINBERG: I don't have a trouble with Your
11 Honor's questions, and we and Mr. McLellan will go to
12 chambers and answer any questions regarding his decision.

13 THE COURT: Okay.

14 MR. FRANK: Okay.

15 (The Court and the court reporter confer.)

16 THE COURT: Counsel, can I see you for a moment.
17 Do you want me to seal the sidebar until after the
18 verdict?

19 MR. WEINBERG: That will be great.

20 THE COURT: I think I'm going to seal this sidebar,
21 until -- to be unsealed after the verdict is rendered, simply
22 based on the following facts. That it concerns the
23 defendant's and the procedures regarding the defendant's
24 possible testimony or not testimony, the exercise of this,
25 how he chooses to exercise his constitutional rights and

1 given that there has been some publicity about this case and
2 publicity in another case apparently concerning the
3 defendant's decision to testify or not.

4 In an effort just to avoid any potential issues
5 with all the -- with the jury, it appears to me that the jury
6 has been fully compliant with all my instructions. I think
7 the balance of public interest, necessarily, to a fair trial
8 is just to seal the sidebar, until -- once the verdict comes
9 back, I don't think at that point it will be unsealed,
10 without further -- the day after the verdict, it will be
11 unsealed, without further order of the Court, absent a motion
12 from somebody.

13 THE COURT: You're welcome, we're adjourned.

14 (Bench conference concluded.)

15 THE COURT: See you at 8:30 tomorrow morning.

16 We stand in recess.

17 THE DEPUTY CLERK: This matter is in recess.

18 (Court in recess at 11:14 a.m.)
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CERTIFICATE OF OFFICIAL REPORTER

I, Rachel M. Lopez, Certified Realtime Reporter, in and for the United States District Court for the District of Massachusetts, do hereby certify that pursuant to Section 753, Title 28, United States Code, the foregoing pages are a true and correct transcript of the stenographically reported proceedings held in the above-entitled matter and that the transcript page format is in conformance with the regulations of the Judicial Conference of the United States.

Dated this 18th day of June, 2018.

/s/ RACHEL M. LOPEZ

Rachel M. Lopez, CRR
Official Court Reporter